Indiana Law Review

Volume 23 No. 3 1990

Indiana National

on the subject of options

Investment Option	Minimum Investment	Maturities	Credit	Income	Benefits
Tax-Exempt Municipal Bonds/ Unit Investment Trusts	$ 5,000 1,000	To 30 Years	Backed by Issuer	Semi-Annual Coupon/ Monthly, Quarterly, Semi-Annual	Exempt from Federal Income Tax for Corporations, and from State and Federal Tax for Individuals.*
Money Market Funds	1,000	Day to Day	Issuing Fund	Monthly	High current income, preservation of capital, easy withdrawal procedures. Share value stability & check writing redemption.
Mutual Funds	250	Open End Funds	Issuing Fund	Monthly	High current return, monthly income, liquidity, high quality portfolios.
U.S. Treasury Bills	10,000	One Year or less	Direct Obligations of U.S. Treasury	Discount to Maturity	High quality, extremely liquid, state tax exempt.*
U.S. Treasury Notes	5,000 1,000	1 - 3 Years 3 - 10 Years	Direct Obligations of U.S. Treasury	Semi-Annual Coupon	High quality, extremely marketable, state tax exempt.*
U.S. Treasury Bonds	1,000	Over 10 Years	Direct Obligations of U.S. Treasury	Semi-Annual Coupon	High quality, extremely marketable, state tax exempt.*
Discount Notes: Primarily Federal Home Loan Banks, FNMA, Federal Farm Credit Banks	10,000	30 to 360 Days	Issuing Agency	At Maturity	May offer higher yields and smaller minimums than Treasury issues. High quality and extremely liquid.*
Federal Farm Credit, FNMA, Federal Home Loan Banks	1,000 5,000 10,000	6 Months to 30 Years	Issuing Agency	At Maturity or Semi-Annual Coupon	May offer higher yields and smaller minimums than Treasury issues. High quality and good marketability.*
Bankers Acceptances	100,000	10 Days to 270 Days	Guaranteed by Issuing Bank	Discount to Maturity	High quality and extremely liquid.*
Commercial Paper	100,000	To 270 Days	Backed by Issuer	At Maturity or Discount to Maturity	High yields, good marketability, highly liquid.*

*Possible market risk if sold before maturity date.

Have you considered all your options?

Investment banking from Indiana National

You may not have thought of Indiana National as a source of investment banking. But we're one of Indiana's major marketers of tax-exempt municipal bonds and notes, government and agency securities.

Reaching your investment goals

Our account executives have proven their capabilities and market insights by assisting clients in the acquisition of over $32 billion in fixed income securities during the last five years.

And because they focus on safety, liquidity and rate of return, they provide the kind of securities that meet clients' investment objectives.

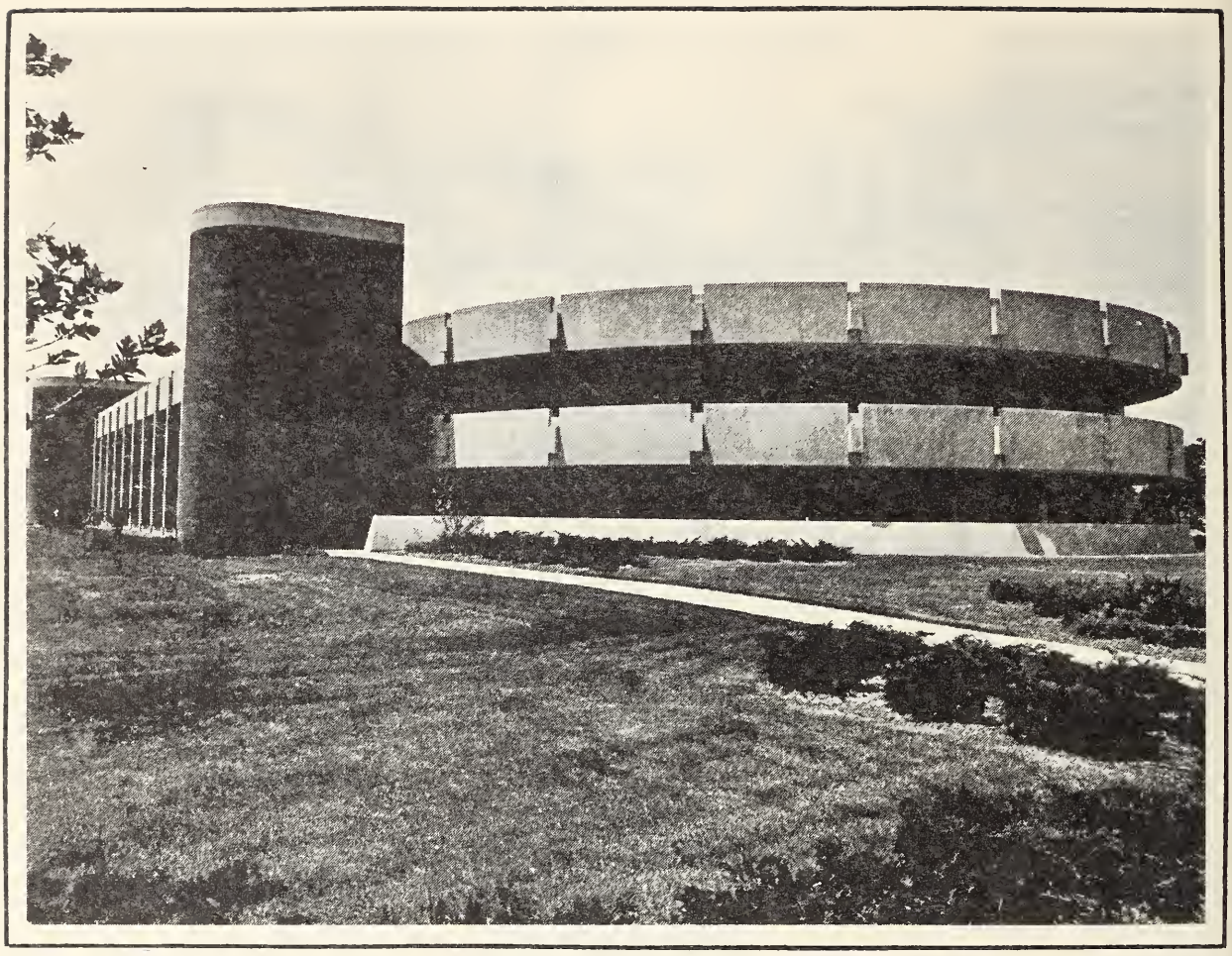
Managing your investment plan

At Indiana National you receive individualized attention to your investment goals. And you benefit from our decades of experience in personal service and prompt execution of trades.

The next time you're ready to make an investment, think of Indiana National. Because, when it comes to meeting your investment objectives, we've got all the options.

Call 1-800-382-1102 or (317) 266-6829 for more information.

Indiana National®
Investment Banking Division Member FDIC



Please enter my subscription to the
INDIANA LAW REVIEW

NAME _____

ADDRESS _____

_____

_____

Enclosed is $_____ for ____ subscriptions.

Bill me for _____ subscriptions.

Mail to:

INDIANA LAW REVIEW
INDIANA UNIVERSITY
SCHOOL OF LAW—INDIANAPOLIS
735 West New York Street
Indianapolis, Indiana 46202

Subscription Rates (one year):

Regular, $22; Foreign, $25; Survey, $15;
Single Issue, $7

Indiana Law Review

Volume 23 1990 Number 3

TABLE OF CONTENTS

Articles

Notes

The INDIANA LAW REVIEW (ISSN 0090-4198) is the property of Indiana University and is published quarterly by the Indiana University School of Law—Indianapolis, which assumes complete editorial responsibility thereof. Subscription rates: one year $22; foreign $25. Please notify us one month in advance of any change in address and include both old and new addresses with zip codes to ensure delivery of all issues. Send all correspondence to Editorial Assistant, Indiana Law Review, Indiana University School of Law—Indianapolis, 735 West New York Street, Indianapolis, Indiana 46202. Publication office: 735 West New York Street, Indianapolis, Indiana 46202. Second class postage paid at Indianapolis, Indiana 46201.

POSTMASTER: Send address changes to INDIANA LAW REVIEW, 735 West New York Street, Indianapolis, Indiana 46202.

Indiana Law Review

Volume 23 1989-1990

Indiana University School of Law—Indianapolis
1989-1990 ADMINISTRATIVE OFFICERS AND FACULTY

Administrative Officers

THOMAS M. EHRLICH, *LL.B., President of the University*
GERALD L. BEPKO, *LL.M., Vice-President*
NORMAN LEFSTEIN, *LL.B., Dean*
JAMES F. BINDLEY, *J.D., Assistant Dean for Administration*
DEBRA A. FALENDER, *J.D., Acting Assistant Dean of Administration*
LAWRENCE P. WILKINS, *LL.M., Associate Dean for Academic Affairs*

Faculty

THOMAS B. ALLINGTON, *Professor. B.S., University of Nebraska, 1964; J.D., 1966; LL.M., New York University, 1971.*

EDWARD P. ARCHER, *Professor. B.M.E., Rensselaer Polytechnic Institute, 1958; J.D., Gerogetown University, 1962; LL.M., 1964.*

JAMES F. BAILEY, III., *Professor and Director of Law Library. A.B., University of Michigan, 1961; J.D., 1964; M.A.L.S., 1970.*

GERALD L. BEPKO, *Vice President and Professor. B.S., Northern Illinois University, 1962; J.D., IIT/Chicago-Kent College of Law, 1965; LL.M., Yale University, 1972.*

JAMES F. BINDLEY, *Assistant Dean for Administration and Director of Placement & Development, B.A., Loyola University, 1969; J.D., University of Kentucky. 1972.*

PAUL N. COX, *Professor. B.S., Utah State University, 1972; J.D., University of Utah, 1974; LL.M., University of Virginia, 1980.*

CLYDE HARRISON CROCKETT, *Professor. A.B., University of Texas, 1962; J.D., 1965; LL.M., University of London (The London School of Economics and Political Science), 1972.*

DEBRA A. FALENDER, *Professor & Associate Dean for Student Affairs. A.B., Mount Holyoke College, 1970; J.D., Indiana University, 1975.*

DAVID A. FUNK, *Professor. A.B., College of Wooster, 1949; J.D., Case Western Reserve University, 1951; M.A., The Ohio State University 1968; LL.M., Case Western Reserve University, 1972; LL.M., Columbia University, 1973.*

PAUL J. GALANTI, *Professor. A.B., Bowdoin College, 1960; J.D., University of Chicago, 1963.*

HELEN P. GARFIELD, *Professor. B.S.J., Northwestern University, 1945; J.D., University of Colorado, 1967.*

HAROLD GREENBERG, *Professor. A.B., Temple University, 1959; J.D., University of Pennsylvania, 1962.*

JEFFREY W. GROVE, *Professor. A.B., Juniata College, 1965; J.D., George Washington University, 1969.*

WILLIAM F. HARVEY, *Carl M. Gray Professor of Law. A.B., University of Missouri, 1954; J.D., Georgetown University, 1959; LL.M., 1961.*

PAUL T. HAYDEN, *Assistant Professor. B.A., Yale University, 1979; J.D., University of California, Los Angeles, 1984.*

W. WILLIAM HODES, *Professor. A.B., Harvard College, 1966; J.D., Rugters Newark, 1969.*

LISA C. IKEMOTO, *Assistant Professor. B.A., University of California, Los Angeles, 1984; J.D., University of California, Davis, 1987; L.L.M., Columbia, 1989.*

LAWRENCE A. JEGEN, III., *Thomas F. Sheehan Professor of Tax Law and Policy, 1982. A.B., Beloit College 1956; J.D., The University of Michigan 1959; M.B.A., 1960, LL.M., Harvard University, 1963.*

HENRY C. KARLSON, *Professor. A.B., University of Illinois, 1965; J.D., 1968; LL.M., 1977.*

WILLIAM ANDREW KERR, *Professor. A.B., West Virginia University, 1955. J.D., 1957, LL.M., Harvard University, 1958; D.B., Duke University, 1968.*

ELEANOR D. KINNEY, *Associate Professor. A.B., Duke University, 1969; M.A., University of Chicago, 1970; J.D., Duke University, 1973.*

WALTER W. KRIEGER, *Associate Professor. A.B., Bellarmine College, 1959; J.D., University of Louisville, 1962; LL.M., George Washington University, 1969.*

NORMAN LEFSTEIN, *Dean and Professor. LL.B., University of Illinois, 1961; LL.M., Georgetown University, 1964.*

David P. Leonard, *Professor. B.A., University of California at San Diego, 1974; J.D., UCLA School of Law, 1977.*

William E. Marsh, *Professor. B.S., University of Nebraska, 1965; J.D., 1958.*

Susanah M. Mead, *Professor. B.A., Smith College, 1969; J.D., Indiana University, 1976.*

Mary H. Mitchell, *Professor. A.B., Butler University, 1975; J.D., Cornell Law School, 1978.*

James P. Nehf, *Assistant Professor. B.A., Knox College, 1979; J.D., University of North Carolina, 1983.*

David R. Papke, *Associate Professor. A.B., Harvard College, 1969; J.D., Yale Law School, 1973; M.A., in American Studies, Yale University, 1973; Ph.D., in American Studies, The University of Michigan, 1984.*

Ronald W. Polston, *Professor. B.S., Eastern Illinois University, 1953; LL.B., University of Illinois, 1958.*

Kenneth M. Stroud, *Professor. A.B., Indiana University, 1958; J.D., 1961.*

James W. Torke, *Professor. B.S., University of Wisconsin, 1963; J.D., 1968.*

Joe A. Tucker, *Assistant Professor. B.A., Houston, 1977; J.D., University of Texas, 1981.*

James Patrick White, *Professor of Law. A.B., University of Iowa, 1953; J.D., 1956; LL.M., George Washington University, 1959.*

Lawrence P. Wilkins, *Professor. B.A., The Ohio State University, 1968; J.D., Capital University Law School, 1973; LL.M., University of Texas School of Law, 1974.*

Mary Wolf, *Director of Clinical Programs, B.A., Saint Xavier College, 1969; J.D., University of Iowa College of Law, 1974.*

Emeriti

Agnes P. Barrett, *Associate Professor Emeritus. B.S., Indiana University, 1942; J.D., 1964.*

Cleon H. Foust, *Professor Emeritus. A.B., Wabash College, 1928; J.D., University of Arizona, 1933.*

John S. Grimes, *Professor of Jurisprudence Emeritus. A.B., Indiana University. 1929; J.D., 1931.*

Melvin C. Poland, *Cleon H. Foust Professor of Law Emeritus. B.S., Kansas State University, 1940; LL.B., Washburn University, 1949; LL.M., The University of Michigan, 1950.*

R. Bruce Townsend, *Cleon H. Foust Professor of Law Emeritus, A.B., Coe College, 1938; J.D., University of Iowa, 1940.*

Legal Writing Instructors

Deborah B. McGregor, *B.A., University of Evansville, 1973; J.D., Georgetown University Law Center, 1983.*

Tracy A. Nelson, *B.A., University of Denver, 1981; J.D., Indiana University, Indianapolis, 1985.*

David A. Reidy, Jr., *B.A., DePauw University, 1984; J.D., Indiana University, Bloomington 1987.*

Joan Ruhtenberg, *Director of Legal Writing. B.A., Mississippi University Women, 1959; J.D., Indiana University, 1980.*

Law Library Staff

Minde C. Glenn, *Reference Librarian, B.A., Western Michigan University, 1979; M.L.S., Indiana University, 1980.*

Wendell E. Johnting, *Asst. Director for Technical Services, A.B., Taylor University, 1974; M.L.S., Indiana University, 1975.*

Mahnaz K. Moshfegh, *Acquisitions/Serials Librarian, B.A., National University of Iran, 1966; M.S., Tehran University, 1971; M.A., Ball State University, 1977; M.L.S., Indiana University, 1983; Ph.D., Indiana University, 1988.*

Kiyoshi Otsu, *Catalog Librarian, A.A., Parkland College, 1976; A.B., University of Illinois, 1980; M.S., 1982; C.A.S., 1983.*

Merlin P. Whiteman, *Asst. Director for Readers' Services, B.A., Hope College, 1973; M.L.S., Indiana University, 1974; J.D., 1982.*

Indiana Law Review

Volume 23 1990 Number 3

Revision of the Uniform Partnership Act, An Analysis and Recommendations

Rodman Elfin*

I. Introduction

The Uniform Partnership Act was approved by the National Conference of Commissioners on Uniform State Laws in 1914. It has been adopted with some modification by forty-nine states.[1] Other uniform and model acts concerning business organizations have been revised in recent years.[2] The National Conference of Commissioners on Uniform State Laws has now undertaken a complete revision of the Uniform Partnership Act.[3] In an effort to aid in this process, a proposed revision of that Act has been prepared by the Uniform Partnership Act Revision Subcommittee of the Committee on Partnerships and Unincorporated

* Professor, Washington State University. B.S. 1950, Syracuse University; J.D. 1952 and LL.M. 1977, New York University.

1. The Uniform Partnership Act, 6 U.L.A. 9-545 (1969) [hereinafter U.P.A.] has been substantially adopted in all states except Louisiana. Alabama, Nebraska and Georgia vary somewhat from the official text. Unif. Partnership Act, 6 U.L.A. 1, 2 (Supp. 1986).

2. The Uniform Limited Partnership Act was substantially revised in 1976, and the revised version has now been adopted in over forty states. Rev. Unif. Ltd. Partnership Act, 6 U.L.A. 200 (Supp. 1985). In 1981, a Close Corporation Supplement to the Model Business Corporation Act was approved and published by the Committee on Corporate Laws of the American Bar Association. *Reprinted in* 37 Bus. Law 269 (1981). The Supplement represented a substantial revision of the Model Business Corporation Act regarding close corporations. In 1983, the Model Business Corporation Act itself underwent substantial revision. *See* Elfin, *A Critique of Portions of the 1983 Revised Model Business Corporation Act*, 28 St. Louis U.L.J. 865 (1984).

3. *See* U.P.A. Revision Subcommittee of the Committee on Partnerships and Unincorporated Business Organizations, American Bar Association, *Should the Uniform Partnership Act Be Revised?*, 43 Bus. Law 121 (1987) [hereinafter *Proposed Revisions*]. The decision to revise this uniform act, which was originally drafted in 1914 and which has been substantially adopted in all states except Louisiana, was taken in August of 1987.

Business Organizations of the American Bar Association.[4] Although the provisions of this long standing act are being reconsidered, I believe that some of its fundamental principles should be challenged.

The purpose of this Article is to propose appropriate revisions of partnership law, and to analyze some of the more significant recommendations of the Committee, or recommendations that the Committee claims to be significant, and to suggest either that the recommendations be adopted as drafted or with modifications. Where I believe the Committee has failed to recommend changes that should be made, such additional changes are suggested. This Article is limited to a discussion of sections 18(f), 25, 31, 32, 38, 40(d), and a new section designated 10A.

II. Statement of Partnership, New Section 10A

The Committee recommends the adoption of an entirely new section providing for the required central filing of a Statement of Partnership.[5] This concept, in a more limited form, has been adopted in California, Florida, and Georgia.[6] The recommendation is that the statement include the name and address of the partnership and the names of the partners. The listing of a name would create a rebuttable presumption as to the liability of that person as a partner. However, "any partner"[7] has the right to file a document to have his or her name removed and such filing would eliminate this nearly automatic liability. Also included in the statement would be the term of the partnership. The foregoing completes the list of matters that are required to be in the statement. On an optional basis, the Committee recommends a provision in the statement regarding the authority of partners. The statement then could "[s]pecify which partner(s), if fewer than all partners have the authority to execute documents on behalf of the partnership; likewise specify if there are any partner(s) whose agency powers are more restricted than those specified in the UPA."[8] Finally, there would be permission to give notice of other matters deemed desirable.

The Committee recommends that the Statement of Partnership be required rather than permissive. This will tend to promote uniformity and secure the benefit of the statement on a wider basis. The Committee

---

4. *Id.* The Committee's proposed revisions have been published. *See Proposed Revisions*, *supra* note 3.

5. *Id.* at 139.

6. Cal. Corp. Code §§ 15010.5-.6 (West 1977 & Supp. 1987); Fla. Stat. Ann. § 620.605 (Harrison 1977 & 1986 Rev.); Ga. Code Ann. § 14-8-10A (1982 & Supp. 1987).

7. The text should read "any person."

8. *Proposed Revisions*, *supra* note 3, at 140.

wisely does not make the filing of the Statement of Partnership a condition of the existence of a partnership because that could nullify the important concept of partnerships being in fact formed by persons whose actions meet the requirements of a partnership with resultant partnership liability. In an effort to preserve the concept of de facto partnership, the Committee recommends that the only penalty for failure to file the Statement of Partnership be inability to use the state's courts until the statement is filed. The trouble with this being the only penalty for failure to file is that many partnerships would never need to file because they are never engaged in litigation. To put more teeth into the legal requirement for filing I suggest in addition, the imposition of a fine which could be applied on an increasing daily basis after notice, and which would be an incentive for all partnerships to file and hence make more uniform and widespread the advantages of filing the statement.

Interestingly, after making the filing of the Statement a requirement (albeit a requirement without penalty for many partnerships), the Committee then recommends that one of the most important segments of the Statement be included on an optional basis. This is the segment concerning the authority of partners to bind the partnership. Since this aspect of the Statement is of great importance to third parties dealing with the partnership, who need certainty in their business dealings, I recommend that it be a mandatory, not optional, part of the Statement.

Second, the effect of the notice of authority recommended by the Committee needs refinement. The Committee correctly concludes that the grant of authority to act to fewer than all partners should bind the partnership because it represents a conferring of actual authority. However, the Committee states that "persons contracting with a partnership on *routine* matters and without knowledge of restrictions contained in the Statement of Partnership should not be bound by a restriction contained in the statement since this result would make conduct of business in a partnership form subject to too many uncertainties."[9] This principle will itself lead to uncertainty and litigation in that there will be constant argument over which matters are routine (in which case the third party will not be bound by the limitation of authority) and which matters are not routine (in which case apparently the third party will be bound by the limitation of authority). If partnership law were as the Committee recommends in this respect, persons would have to search the records or deal with the partnership at their peril with respect to a later finding that the matter involved was not routine. I suggest that instead of making a limitation of authority binding or not on a third

9. *Id.* (emphasis added).

party depending upon the elusive question of whether or not the transaction was routine, it should be made binding in transactions involving real estate and not otherwise. In a real estate transaction, the searching of records will take place as a matter of course and the search for one additional document will not be a burden. On the other hand, all persons dealing with the partnership will be relieved of an effective requirement of a record search for all other transactions, which otherwise would be imposed because of a possibility that the transaction will later be held to be not routine. The effect of the suggestion I am making is that all matters set forth in the Statement of Partnership will be binding *against* the partnership. However, any matters set forth are binding on third parties dealing with the partnership only in connection with real estate transactions concerning real property within the state.

III. Partner's Renumeration, Section 18(f)

Under the present Act, absent any agreement between the partners to the contrary "[n]o partner is entitled to remuneration for acting in the partnership business, except that a surviving partner is entitled to reasonable compensation for his services in winding up the partnership affairs."[10] The Committee recommends a modification of the general rule and of the exception.[11]

The general rule that, absent an agreement to the contrary, no partner is entitled to remuneration for acting in the partnership business is a good one. In most cases, the application of this rule works well and no doubt avoids many disputes about compensation that one partner may feel he or she is entitled to for services rendered in excess of services rendered by his or her partners. Furthermore, where it is expected that one partner will perform services in excess of the services performed by another, and where appropriate compensating adjustments have not been made (for example, by varying capital contributions), the partners may, under the general rule, provide in their express agreement for additional compensation to the partner performing excess services. A reversal of this rule would probably be contrary to the expectations of

---

10. Unif. Partnership Act § 18(f), 6 U.L.A. at 213. The present text reads in relevant part:

> Sec. 18. Rules Determining Rights and Duties of Partners.
>
> The rights and duties of the partners in relation to the partnership shall be determined, subject to any agreement between them, by the following rules:
>
> . . . .
>
> (f) No partner is entitled to remuneration for acting in the partnership business, except that a surviving partner is entitled to reasonable compensation for his services in winding up the partnership affairs.

11. *Proposed Revisions*, *supra* note 3, at 148.

most partners and is therefore not advisable. However, there are times when one partner performs, or even consistently performs, a disproportionate share of the work under circumstances where this was not originally contemplated and probably would have caused an agreement about disparate compensation if such had been originally contemplated. Some relief should be available in this situation short of a dissolution of the partnership and the frequent monetary loss that accompanies liquidation of the business.

The Committee recommends a revision of section 18(f) to authorize compensation for services by a partner pursuant to court order. I strongly endorse this recommendation. Under it, the general rule, which works well in most cases, remains as it has been under the present act. However, courts will not be precluded by statute from affording relief where one of the partners unexpectedly performs a disproportionate share of the work, or where one of the partners has absented himself from the management of the business.

A remedy should exist to redress these unfair situations, and authorization of compensation for services by court order provides such a remedy. An additional positive result is that the *threat* of court ordered compensation for services by a partner will undoubtedly lead to agreements to pay salaries to partners who are equitably entitled to salaries where such agreements would never be made under the present rigid rule. Because of this, little litigation should result from the Committee's recommendation.

The Committee recommends another modification of section 18(f), which I endorse. The present Act contains one exception to the rule that disallows remuneration for partners, that is "except that a *surviving* partner is entitled to reasonable compensation for his services in winding up the partnership affairs."[12] There is no reason to distinguish between entitlement to compensation of one who winds up a partnership after the death of a partner from one who winds up after a voluntary dissolution. As the Committee correctly points out, the present Act "appears to allow post-dissolution compensation only when the dissolution is caused by the death of a partner."[13] The section should be amended as the Committee suggests, to allow compensation to a partner for winding up services after a voluntary dissolution.

IV. Nature of a Partner's Right in Specific Partnership Property, Section 25

With respect to section 25,[14] the Committee recommends, as significant, a revision to provide that "a partner has no rights in specific

---

12. Unif. Partnership Act § 18(f), 6 U.L.A. at 213 (emphasis added).
13. *Proposed Revisions*, *supra* note 3, at 148.
14. The present text of Section 25 is as follows:

partnership property, other than the right to use such property in the conduct of partnership business."[15] I support the recommendation because it is clear and direct. However, it does not change the law in any way because the present law has the same meaning. It is not quite as direct, but it is just as clear. The present law states that "a partner has an equal right with his partners to possess specific partnership property for partnership purposes; but he has no right to possess such property for any other purpose without the consent of his partners."[16] Subsequent sections of the present law reinforce the statute's adherence to the entity theory in this regard when it is stated that an individual partner may not assign this right, that the creditors of individual partners may not levy upon it, that partnership creditors are not subject to partner's exemptions, that a deceased partner's rights in such property vests in the surviving partner, and that the right is not subject to dower or curtesy.[17] A reading of the entire present section 25 clearly reflects that, absent an agreement to the contrary (and certainly such an agreement should be controlling), a partner has no rights in specific partnership property other than the right to use such property in the conduct of

---

Sec. 25. Nature of a Partner's Right in Specific Partnership Property.

(1) A partner is co-owner with his partners of specific partnership property holding as a tenant in partnership.

(2) The incidents of this tenancy are such that:

(a) A partner, subject to the provisions of this act and to any agreement between the partners, has an equal right with his partners to possess specific partnership property for partnership purposes; but he has no right to possess such property for any other purpose without the consent of his partners.

(b) A partner's right in specific partnership property is not assignable except in connection with the assignment of rights of all the partners in the same property.

(c) A partner's right in specific partnership property is not subject to attachment or execution, except on a claim against the partnership. When partnership property is attached for a partnership debt, the partners, or any of them, or the representatives of a decreased partner, cannot claim any right under the homestead or exemption laws.

(d) On the death of a partner his right in specific partnership property vests in the surviving partner or partners, except where the deceased was the last surviving partner, when his right in such property vests in his legal representative. Such surviving partner or partners, or the legal representative of the last surviving partner, has no right to possess the partnership property for any but a partnership purpose.

(e) A partner's right in specific partnership property is not subject to dower, curtesy, or allowances to widows, heirs, or next of kin.

UNIF. PARTNERSHIP ACT § 25, 6 U.L.A. at 326.

15. *Proposed Revisions*, *supra* note 3, at 154.

16. UNIF. PARTNERSHIP ACT § 25(2)(a), 6 U.L.A. at 326.

17. *Id.* § 25(2).

partnership business. The Committee's recommendation is therefore benign. Perhaps it is advisable for the sake of directness, but it does not change prior law.

In connection with its recommendation concerning section 25, and the entity theory which is advanced whenever possible by the Committee,[18] the Committee suggests a revision "to make it clear that a partner who misappropriates partnership property is guilty of embezzlement in the same manner and to the same extent that he would be guilty of embezzlement if he misappropriated the property of a corporation, or any other kind of entity in which he had an ownership interest."[19] The Committee could use this wording, limited as it is to the concept of embezzlement. I suggest, instead, that the idea be put in a broader context by wording such as: "A partnership owns its assets in the same way that a corporation owns its assets. Partners, as individuals, have no more claim or interest in partnership assets than the shareholders of a corporation have in corporate assets." Whether the Committee's suggested language is used or my suggested language is used, this is a significant and positive change. The impetus for this recommendation is that under present law, it is generally held that a partner cannot be guilty of embezzlement or larceny of partnership property because the essential element of taking the property of another is lacking.[20] This results from an application of the aggregate theory of partnership and the fact that partnership property belongs to all the partners including the accused partner. Therefore, the accused partner is not taking the property of *another*, which is a usual requisite of embezzlement or larceny. The Committee's view is that because, conceptually, a partner is part owner of partnership property, this alone should not be a defense to such a criminal action. The Committee's view in this regard is sound. The entity theory comports with the general expectations of business persons in that theft by a partner of partnership property should be treated no differently than theft by any officer-shareholder from a close corporation or any corporation.

V. Causes of Dissolution, Section 31

Under section 31(1)(b) of the present Act, "[d]issolution is caused: (1) Without violation of the agreement between the partners, . . . (b) By the express will of any partner when no definite term or particular

---

18. *Proposed Revisions*, *supra* note 3, at 124.

19. *Id.* at 154.

20. *See, e.g.*, State v. Birch, 36 Wash. App. 405, 675 P.2d 246 (1984). *See also* Annotation, *Embezzlement, Larceny, False Pretenses or Allied Fraud by a Partner*, 82 A.L.R.3d 822 (1978).

undertaking is specified, ..."[21] It is appropriate to discuss also section 38 at this point because by virtue of section 38, each partner under these circumstances may require liquidation of the business.[22] The Committee's recommendation with respect to section 31(1) (and the effect of dissolution by virtue of section 38) is brief to a fault. Section 31(1)(b) is set forth by the Committee under the category "Discussed But No Changes Recommended."[23] In its introductory discussion concerning dissolution, the Committee recommends that a new statute "authorize the non-withdrawing partners to continue the partnership after dissolution and, if they agree to do so within ninety days of a partner's withdrawal, limit the withdrawing partner's rights to receiving the fair value of his capital and his share of undistributed profits less any provable damages."[24] This fundamental change from prior law calls for substantial discussion and analysis not provided by the Committee.

A partnership statute should continue the wise position of the present Uniform Act in allowing the partners by their agreement to vary most of the rules that will govern their business. Thus, by agreement the partners should be able to provide for the maximum liquidity that follows dissolution at will under the present Act, or the much more restrictive rights that result from the specific performance of their agreement as suggested here. However, a partnership statute should provide for the rights of the parties who have not addressed these issues in their agreement. The statute must fill in the blanks that exist in the agreement between the parties. The large, well-financed partnership will undoubtedly address the relevant issues in the partnership agreement, and therefore it is only necessary for the statute to permit such partners to contract freely. With respect to the smaller potential business, the statute should provide for those rights and obligations that will best serve the interests of parties who have not had the foresight to address the issues. The existence of such provisions will often reduce the start-up costs of the business by eliminating the need for custom-tailored agreements. In addition, the statute should provide the framework most likely to be desirable for those who have formed a partnership informally and for those who are legally, although unwittingly, operating a partnership.

A. The Right to Dissolve Where the Parties Have Not Provided for a Definite Term or the Accomplishment of a Particular Purpose

Where the partners have not themselves provided for stability, and hence there exists a partnership at will, the question should be asked—

---

21. UNIF. PARTNERSHIP ACT § 31, 6 U.L.A. at 376.
22. *Id.* § 38, 6 U.L.A. at 456-57. *See infra* note 25.
23. *Proposed Revisions*, *supra* note 3, at 165.
24. *Id.* at 126.

is the power of one partner to compel liquidation too powerful, and should not the statute, absent a contractual provision to the contrary, provide for a less drastic result, namely liquidation only upon a failure of the remaining partners to buy out the dissatisfied partner at an agreed value or fair value? Consider the situation where the parties have not provided for a definite term or duration until the accomplishment of a particular purpose, that is where they have purposely established a partnership at will. Here, the advantages of liquidity and the ability to terminate future liabilities created by one's partners, both secured by dissolution, must be balanced against the harm visited on the other partners. This balance indicates a resolution different from one where there is a breach of an agreement not to dissolve. It is submitted that if they considered it, most partners would be unlikely to agree that each of them would have the right to compel liquidation at will. Liquidity of investment is often highly desirable. This factor, however, should be balanced against the costs that dissolution will inflict upon the partners who wish to continue the business. Lying between the absolute power to dissolve granted by the present act, and the total absence of that right, would be a power to dissolve; but only after failure of the other partners to elect to buy out the interest of the partner wishing to exit, at fair value, or a predetermined value. This option addresses the needs of *both* parties better than the approach of the present Act which, by allowing dissolution at will, destroys the business against the wishes of the other partners in order to achieve the objective of the one partner who desires dissolution.

An advantage of a right to cause dissolution at will, which largely remains even when circumscribed by the right of the other partners to buy out at fair value the interest of the partner wishing to exit, is that this right discourages exploitive conduct on the part of managing or majority partners. Exploitive conduct, as making decisions which benefit managing or majority partners personally at the expense of the firm, is discouraged or can be remedied by enforcing fiduciary duties. However, this remedy is not always viable because it involves questions about the authority of managing or majority partners, and proof of damages and the extent thereof, all of which represent an expensive transaction cost in the form of litigation expense. Exploitive conduct will tend to be minimized if the proposed exploiter knows that he or she, as a result of such conduct, will be forced to buy out the interest of his or her partner at that person's option. The advantage of the buy-out right, especially in the common situation where fault or the degree of fault is not clear, is that it prevents one partner from causing dissolution and destroying the business. It is not a perfect solution to the securing of protection for the other partners because they may have to sell off important business assets, or place themselves in a disadvantageous debt

position in order to pay the partner who is leaving the fair value of his or her interest. It is, however, a reasonable compromise between the extremes of an absolute right to dissolve which provides liquidity for the partner leaving but which destroys the business, and the total absence of a right to fair compensation where a specified term or accomplishment of particular purpose has not been agreed upon. It should be noted here that in a typical small firm where one partner desires to exit and several partners remain, in balancing interests and financial ability it is probably an accomplishment of greater good for greater numbers to place some burden upon a remaining group to come up with funds to represent fair value, than to make impossible the exit of one member with fair value in his or her pocket.

Fairness does not result from the provisions of the present Act that permit any partner in a partnership at will to dissolve and cause liquidation of the business.[25] The right to leave the partnership in a manner that causes the liquidation of the business should be circumscribed by a right of the other partners to buy out the interest of the partner wishing to exit for fair value, *and thus to keep the business intact for the benefit of the remaining partners* while permitting the partner who wishes to exit to obtain reasonable liquidity. The partner who desires to exit should not be permitted to insist on a sale of the business. Fair value can be established by any method or formula agreed upon beforehand or at the time by the parties. In the absence of agreement, fair value can be determined by a court.

An unfortunate result of the present Uniform Partnership Act is that by allowing a partner to force liquidation of the business there often follows destruction of the going concern value of the business, and this represents a loss to all of the partners. Also upon a forced sale of the assets of the business, the partner who is in the best financial position will have an unfair advantage over the others in purchasing the business. This unfair advantage is lost or at least is diminished if there exists initially only a right to be bought out at a fair value set by agreement or by a court. A right to cause liquidation, on the other hand, can unfairly strengthen the position of a partner who is in a relatively better financial position and wishes to take over the business. The right to cause liquidation increases the possibility that one partner can unfairly squeeze out the other. Thus, justice and fairness will be served by circumscribing any liquidation right with a right of the other partners to avoid liquidation through a buy out at fair value.

In order to protect the liquidity of each partner's investment, forced sale of the business must be permitted if the other partners decline to

---

25. Unif. Partnership Act § 38(1), 6 U.L.A. at 456. *See infra* note 45.

exercise a right to buy out or fail to complete a buy out. A partner should also be able to force liquidation in certain limited situations, as where the business has become unlawful. This is provided for by the present Uniform Act and should be continued.[26]

Dissolution and buy out cannot affect the outgoing partner's obligations to third parties for preexisting debts and duties. Therefore, the outgoing partner should be entitled to an indemnification agreement from the partners who are continuing the business, and the value of this indemnification agreement should be considered when establishing the fair value paid to the outgoing partner.

The purpose behind the modification of the right to dissolve and force sale of the business by a right in the remaining partners to buy the interest of the exiting partner at fair value is to insure that each partner's *investment* is reasonably liquid, without liquidating the business. In addition to serving this purpose, it will also generally be preferable from an economic standpoint not to liquidate the business because the going concern value of the business will usually be greater than the proceeds of a sale of its assets. In most instances it should not be too great a burden for the remaining partners to purchase the interest of the exiting partner if the business is a viable one. If sufficient cash is not available, the remaining partners could borrow, using the assets of the business as security. In the alternative, provisions could be made earlier in the partnership agreement, or it could be required by a court establishing fair value that the purchase price be paid on an installment basis. If all of the remaining partners are not willing to join in the purchase, the interest of the outgoing partner should be offered pro rata to those willing to buy.

The remaining partners who elect to purchase the interest of the outgoing partner, rather than face liquidation of the business, may be required to commit funds to the enterprise beyond what was originally contemplated. However, it is these very persons who will decide whether that investment is preferable to a liquidation. Undoubtedly they would prefer to have this option rather than have liquidation forced upon them. As an alternative to making this additional investment, the buy-out may be accomplished by finding a new investor acceptable to the remaining partners.

The right to prevent liquidation through buy-out should not be frustrated by the failure of the parties to agree beforehand or at the time to a fair value. Therefore, if the parties cannot agree on fair value, it should be established by a court. The determination of fair value of businesses has received considerable attention and will not be a new

---

26. UNIF. PARTNERSHIP ACT § 31(3), 6 U.L.A. at 376.

burden on the judicial system.[27] Courts frequently establish the fair value of businesses with regard to the appraisal right under the Model Business Corporation Act and similar statutes.[28] They also do so in connection with businesses that are being reorganized under Chapter 11 of the Bankruptcy Reform Act.[29] Courts are therefore familiar with the determination of fair value in connection with the merger and reorganization of corporations, whose businesses are little or no different from those of partnerships.[30] Similar standards and procedures can be used to determine the fair value of a business owned by a partnership. To maintain the viability of the business, and to prevent a cash drain on the remaining partners that is too severe or borrowing on terms that are too harsh, the court should be empowered to provide for payment in installments with provision for adequate security. Only if there is a failure to purchase, or failure to complete the purchase as agreed or ordered by a court, should the business be liquidated to pay off the exiting partner.

B. An Agreement Not to Dissolve for a Definite Term Should be Specifically Enforced Under the New Partnership Act

Under present partnership law, even where the partners have agreed that the partnership will remain in existence for a definite period of time or until a particular purpose has been accomplished, any partner has the power, although not the right, to dissolve the partnership.[31] When such a wrongful dissolution occurs, the partners who have not wrongfully caused dissolution do possess a right against the partner who wrongfully caused dissolution for damages.[32] However, the partnership

---

27. For a discussion of the establishment of fair value in the context of a close corporation, which is not at variance with its establishment for a partnership, see Schreier and Joy, *Judicial Valuation of "Close" Corporation Stock: Alice in Wonderland Revisited*, 31 OKLA. L. REV. 853 (1978).

28. MODEL BUSINESS CORP. ACT § 81 (1981). *See also* REVISED MODEL BUSINESS CORP. ACT, ch. 13 (1983) (dissenters' rights).

29. Bankruptcy Reform Act, 11 U.S.C. §§ 1101-46 (1978).

30. MODEL BUSINESS CORP. ACT ANN. 2D §§ 80-81 (1977).

31. UNIF. PARTNERSHIP ACT § 31, 6 U.L.A. at 376 provides:

> "Dissolution is caused:
>
> . . . .
>
> (2) In contravention of the agreement between the partners, where the circumstances do not permit a dissolution under any other provision of this section, by the express will of any partner at any time. . . .

See also Napoli v. Domnitch, 18 A.D.2d 707, 708, 236 N.Y.S.2d 549, 551-52 (1962), *aff'd*, 14 N.Y.2d 508, 147 N.E.2d 623, 248 N.Y.S.2d 228 (1964); Campbell v. Miller, 274 N.C. 143, 150-51, 161 S.E.2d 546, 551 (1968).

32. UNIF. PARTNERSHIP ACT § 38(2)(a)(II), 6 U.L.A. at 456.

has been dissolved, and as the following discussion indicates, frequently damages are not able to place the innocent partners in the position they would have occupied absent the breach. The Committee does not recommend change from the existing law which allows for dissolution in these circumstances. My contention is that the power to dissolve in this circumstance should be largely curtailed by a new statute. It should be noted that by judicial decision, a first crack has appeared in the principle that a court cannot enjoin the dissolution of a partnership. In 1984, the First Circuit stated that this principle is grounded in cases that have a strong personal services flavor. In the case of *Infusaid Corp. v. Intermedics Infusaid, Inc.*,[33] the court held that where the partners are corporations, legal remedies are inadequate, and there is no significant personal service component, a court may order specific performance of a partnership agreement.[34] Where a profitable venture can be maintained without requiring any corporate officer to serve against his will, the corporate partners can be ordered to continue the business according to the terms of their agreement.[35]

In many situations personal services are a component, and specific performance may not be feasible. However, in order to give stability to the greatest extent possible to those partnerships whose partners have bargained for that quality, this Article will propose a more refined and precise group of remedies to replace the absolute power to dissolve.

1. *Protecting Expectations.*—There is little need beyond what has already been suggested to disturb the present position of the Uniform Partnership Act concerning the absolute power of a partner to dissolve the partnership where money damages can be accurately determined and where money damages provide adequate compensation to the partners who have bargained for stability but who are now faced with premature dissolution. The words adequate compensation should embrace the concepts of fairness and ethical behavior. Where money damages cannot be accurately determined or where they do not provide adequate compensation as described, the law should not hesitate to hold a partner to a promise which that person has freely made, to the extent that this is feasible. In this regard it should be noted that authority exists with respect to contract law in general that when the issue arises, "[d]oubts should be resolved in favor of the granting of specific performance or injunction."[36] This principle should have applicability to the breach of a partnership contract where damages may be difficult to prove prospectively.

---

33. 739 F.2d 661 (1st Cir. 1984).
34. *Id.* at 669.
35. *Id.*
36. RESTATEMENT (SECOND) OF CONTRACTS § 359 comment a (1981).

It is hard to understand why the concept of absolute power of a partner to cause dissolution has remained entrenched in partnership law so long while it does not exist, absent a contract so providing, in the context of the so-called incorporated partnership, the close corporation. The close corporation is recognized as one that has relatively few shareholders who are personally known to one another and who are active in management.[37] The transfer of shares in a close corporation to outsiders is generally restricted by contract or through provisions in the articles of incorporation. There is no established market for the shares. The shareholders who are frequently officers and/or directors receive all or a substantial portion of their income from the corporation.[38] The close corporation is referred to as an incorporated partnership because it is a business that would have used the partnership vehicle except for a desire to have certain tax or limited liability advantages.[39] Absent a contractual provision so providing, no state statute permits the dissolution of a close corporation at the election of a single minority shareholder. Instead, voluntary dissolutions take place upon a vote of a certain percentage of outstanding shares, usually a majority.[40] There appears to be no reason to distinguish the grant of the power of dissolution to a single partner, and denial of that right to a single shareholder of a close corporation. There ought to be one rule for both of these similar business organizations. Although technically the partner faces unlimited personal liability and the shareholder does not, as a practical matter the shareholder may have invested most of his or her personal wealth in the corporation, and therefore risks as much as the partner.

Partners have an option of creating a partnership at will where, under the present Act, each partner has the right as well as the power to cause dissolution not in contravention of the partnership agreement, and where no damages result from a decision to dissolve.[41] On the other

---

37. Wasserman v. Rosengarden, 84 Ill. App. 3d 713, 716, 406 N.E.2d 131, 134 (1980); 1 F. O'NEAL, CLOSE CORPORATIONS §§ 1.02 & 1.07 (2d ed. 1971).

38. Helms v. Duckworth, 249 F.2d 482, 486 (D.C. Cir. 1957); Galler v. Galler, 32 Ill. 2d 16, 27, 203 N.E.2d 577, 583-84 (1965).

39. 68th St. Apts., Inc. v. Lauricella, 142 N.J. Super. 546, 557, 362 A.2d 78, 84 (N.J. Super Ct. Law Div. 1976), *aff'd per curiam*, 150 N.J. Super. 47, 374 A.2d 1222 (N.J. Super Ct. App. Div. 1977).

40. *See, e.g.*, CAL. CORP. CODE § 1900 (West 1977) (requires one-half); DEL. CODE. ANN. tit. 8, § 275 (1975) (requires majority).

41. Dissolution is caused:

> (1) Without violation of the agreement between the partners,
>
> . . . .
>
> (b) by the express will of any partner when no definite term or particular undertaking is specified . . .

UNIF. PARTNERSHIP ACT § 31(1)(b), 6 U.L.A. 376.

Only when dissolution is caused wrongfully do innocent partners have a right to damages against the partner who caused dissolution. *Id.* § 38(2)(a) II, 6 U.L.A. at 456.

hand, when the partners have agreed to maintain the partnership for a certain period of time or until the purpose for which the partnership was formed has been accomplished, they have done this in order to bring stability to the business organization. If the partners have established a duration, they undoubtedly intended that the exit of a partner prior to the end of the term should be on a different basis than in a partnership at will. The stability which has been bargained for should not be denied by allowing one partner unilaterally to require a premature dissolution. By agreeing to a fixed term, each partner has agreed to subordinate his or her ability to withdraw from the partnership and the risks which partnership entails, to the legitimate expectations of the other partners. This expectation should be specifically enforced.

2. Enforceability of the Promise.—Many of the obligations of a partner can be specifically enforced. The single obligation of personal service cannot be specifically enforced, although as will be seen, it can be substantially encouraged. Merely because a court cannot effectively compel a person to perform personal services does not mean that partnership law must terminate a person's *status as a partner* in violation of the partnership agreement. Just because personal service cannot be required, it does not follow that a person in breach of the partnership agreement should be freed of his or her other obligations as a partner.

Some partners by their agreement have no obligation at all to provide services. Such partner's obligation may be strictly to provide capital initially and in the future, and to lend his or her credit and reputation to the business. All of that partner's obligations may be specifically enforced. By specifically enforcing those obligations, the other partners are provided with the elements they bargained for. In addition, because the partner who wanted to exit the business, as a partner, remains liable for losses, a bargained-for consideration is preserved which would be unlikely to have found its way into a computation of damages because it would be speculative. Furthermore, because the partner who wished to exit the business, as a partner, continues to lend his or her credit rating to the business, another bargained-for element of consideration remains in effect which would vanish upon dissolution, and which is often not susceptible to being ascertained as to dollar value and, therefore not included as an element of damages on wrongful dissolution.

If the partner who wishes to exit the business is one who is obligated to provide services, although those services cannot be specifically compelled, a failure to allow dissolution can encourage a voluntary provision of those services. This results from the fact that where that person retains the status of partner, it will behoove that person to provide the services that will achieve profits and avoid losses.

Furthermore, where that person retains the status of partner, he or she retains the fiduciary obligations which would prevent that person

from competing with the partnership and which would require the sharing of opportunities with the partnership. With all of these substantial obligations in mind, the person who could not be *compelled* to render services to the partnership will frequently decide that it is in his or her best interest to remain fully active in all of the aspects of the partnership. It becomes apparent that although a court cannot specifically enforce the single element of personal services, those services will be encouraged by maintaining the status of partner. All other obligations of partners can be specifically enforced.

The parties are entitled to receive the consideration they have bargained for when their agreement provides for a partnership to last for a fixed term or until a particular purpose has been accomplished. To the extent that a law can protect or encourage bargained-for stability, it should do so. A partner should be denied not only the right, but also the power, to dissolve a partnership before the expiration of the agreed term or accomplishment of its purpose.

3. Exceptions.—The prohibition against allowing a partner to cause dissolution in violation of an agreement to continue for a definite term or until the accomplishment of a certain purpose is designed to prevent such dissolution by a partner who desires it for business or personal reasons. Fairness and justice require that innocent partners who desire a dissolution should be able to secure dissolution where another partner has seriously breached the partnership agreement, where it has become unlawful to carry on the business of the partnership, where the business cannot be carried on at a profit (and the partnership was not created as a tax shelter where losses were anticipated), and where the partners are deadlocked. Furthermore, a court should be permitted to order dissolution, in spite of an agreement to continue for a definite term or undertaking where a court finds that the expectations of any partner, including the disabled partner, are frustrated because of the disability of a partner. In like manner, a court should be permitted to order dissolution where the expectations of any partner are frustrated because of the bankruptcy of any partner.

VI. Dissolution by Decree of Court, Section 32

The Committee recommends a number of changes in section 32.[42] Some of the more significant changes which it would endorse include

---

42. The text of present Section 32 is as follows:

Sec. 32. Dissolution by Decree of Court.

(1) On application by or for a partner the court shall decree a dissolution whenever:

(a) A partner has been declared a lunatic in any judicial proceeding

a modernization of the word "lunatic" with the substitution of "incompetent to manage his person or his estate," and a deletion of section 32(1)(e), "[t]he business of the partnership can only be carried on at a loss,"[43] as an independent ground for dissolution. There are situations, for example early stages of a business, use of the business as a tax shelter, or tax loss, when mandatory dissolution would not be in the best interest of the partners or some of them. In appropriate circumstances, financial loss could still lead to dissolution under section 32(1)(f) where dissolution is authorized under circumstances that render a dissolution equitable.

A long overdue correction of the second part of section 32 is recommended by the Committee. In its present form, the section consists of only part of a sentence. The subject and part of the predicate are missing. The section presently reads:

> (2) On the application of the purchaser of a partner's interest under section 27 or 28:
> (a) After the termination of the specified term or particular undertaking,
> (b) At any time if the partnership was a partnership at will when the interest was assigned or when the charging order was issued.[44]

Section 32(2) does not convey a meaning. The obvious omission from the text are the words "the court shall decree a dissolution" which must be added at the end of the introductory clause. It is remarkable that

---

or is shown to be of unsound mind,
(b) A partner becomes in any other way incapable of performing his part of the partnership contract,
(c) A partner has been guilty of such conduct as tends to affect prejudicially the carrying on of the business,
(d) A partner willfully or persistently commits a breach of the partnership agreement, or otherwise so conducts himself in matters relating to the partnership business that it is not reasonably practicable to carry on the business in partnership with him,
(e) The business of the partnership can only be carried on at a loss,
(f) Other circumstances render a dissolution equitable.
(2) On the application of the purchaser of a partner's interest under sections 27 or 28:
(a) After the termination of the specified term or particular undertaking,
(b) At any time if the partnership was a partnership at will when the interest was assigned or when the charging order was issued.

UNIF. PARTNERSHIP ACT § 32, 6 U.L.A. at 394.

43. *Id.*

44. *Id.*

of the forty-nine states that adopted the Uniform Partnership Act, only six corrected this obvious error.[45]

The Committee failed to recommend a change in section 32 that would correct the presently misleading impression that sections 32(1)(c) and (d) are mandatory causes of dissolution by court decree. Dissolution appears to be mandatory because of use of the word "shall." The section begins with the phrase, "[o]n application by or for a partner the court shall decree a dissolution whenever . . . ."[46] Under the statute, the court must find, for a section 32(1)(c) dissolution, that "a partner has been guilty of such conduct as *tends to affect prejudicially* the carrying on of the business."[47] A court necessarily has so much discretion in the weighing and balancing of evidence in order to make a finding that facts "tend to affect prejudicially" that it is a misnomer to state that this action is mandatory. In a similar fashion regarding section 32(1)(d), it is misleading for the Uniform Partnership Act to use the mandatory word "shall," when in order for a court to order dissolution, the court must find that the partner "so conducts himself in matters relating to the partnership business that it is not *reasonably practicable* to carry on the business in partnership with him."[48] So much leeway exists in a court's determination of what is "reasonably practicable" that it is misleading for the statute by the use of the word "shall" to cast this in the category of mandatory grounds for dissolution.

Realistically, these grounds for dissolution should be recognized as being found in the discretion of the court. This discretion should, moreover, be constrained by the principle that a partner's action which is of a trifling nature or which constitutes only a temporary grievance, not involving permanent damage, cannot be a ground upon which dissolution is ordered. Instead, dissolution should only be ordered when the facts show gross misconduct or lack of good faith or when those facts cause serious and permanent injury.[49]

In order to incorporate the thoughts expressed above, and for honesty of purpose and clarity of meaning, I suggest that the introductory wording to section 32(1)(c) and (d) as it has existed, and as it is still recommended by the committee, be eliminated. Instead of the words, "[o]n application by or for a partner the court shall decree a dissolution,"[50] the section

---

45. The states that have corrected this error by adding the phrase "[t]he court shall decree a dissolution" are Arizona, Georgia, Maryland, Montana, New Hampshire and Rhode Island.

46. UNIF. PARTNERSHIP ACT § 32(1), 6 U.L.A. at 394.

47. *Id.* (emphasis added).

48. *Id.* § 32(1)(d) (emphasis added).

49. Wood v. Holiday Mobile Home Resorts Inc., 128 Ariz. 274, 625 P.2d 337, 343 (1980); *see also* Fuller v. Brough, 159 Colo. 147, 411 P.2d 18 (1966).

50. UNIF. PARTNERSHIP ACT § 32, 6 U.L.A. at 394.

should be changed to read, "On application by or for a partner, the court may decree a dissolution when, in the exercise of its sound discretion, and after balancing the equities involved, the court determines that . . . ."

VII. Rights of Partners to Application of Partnership Property, Section 38

The Committee recommends numerous changes to section 38.[51] I will first discuss only briefly the many recommendations with which I

---

51. The text of present Section 38 is as follows:

Sec. 38. Rights of Partners to Application of Partnership Property.

(1) When dissolution is caused in any way, except in contravention of the partnership agreement, each partner as against his co-partners and all persons claiming through them in respect of their interests in the partnership, unless otherwise agreed, may have the partnership property applied to discharge its liabilities, and the surplus applied to pay in cash the net amount owing to the respective partners. But if dissolution is caused by expulsion of a partner, bona fide under the partnership agreement and if the expelled partner is discharged from all partnership liabilities, either by payment or agreement under section 36(2), he shall receive in cash only the net amount due him from the partnership.

(2) When dissolution is caused in contravention of the partnership agreement the rights of the partners shall be as follows:

(a) Each partner who has not caused dissolution wrongfully shall have,

I. All the rights specified in paragraph (1) of this section, and

II. The right, as against each partner who has caused the dissolution wrongfully, to damages for breach of the agreement.

(b) The partners who have not caused the dissolution wrongfully, if they all desire to continue the business in the same name, either by themselves or jointly with others, may do so, during the agreed term for the partnership and for that purpose may possess the partnership property, provided they secure the payment by bond approved by the court, or pay to any partner who has caused the dissolution wrongfully, the value of his interest in the partnership at the dissolution, less any damages recoverable under clause (2a II) of the section, and in like manner indemnify him against all present or future partnership liabilities.

(c) A partner who has caused the dissolution wrongfully shall have:

I. If the business is not continued under the provisions of paragraph (2b) all the rights of a partner under paragraph (1), subject to clause (2a II), of this section,

II. If the business is continued under paragraph (2b) of this section the right as against his co-partners and all claiming through them in respect of their interests in the partnership, to have the value of his interest in the partnership, less any damages caused to his co-partners by the dissolution, ascertained and paid to him in cash, or the payment secured by bond approved

concur or suggest only minor changes. For support of these changes, the reader is referred to the Committee's own analysis.[52] The first recommendation is to "clarify that 'wrongful' dissolution in sections 38(1) and (2) includes dissolution resulting from wrongful conduct under sections 32(1)(c) and (d) as well as dissolution in contravention of the agreement under section 31(2)."[53] This should be done because a persuasive argument can be made that the situations described in sections 32(1)(c) and (d), previously discussed, would constitute a breach of the implied terms of almost all partnership agreements. The inclusion of these matters as constituting wrongful dissolution (essentially conduct that tends to affect prejudicially the carrying on of the business and willful or persistent breach of the partnership agreement) clarifies what had been somewhat ambiguous. I suggest here just one modification of the Committee's proposal. In order to maximize the flexibility of partnerships, this inclusion should be made specifically subject to the contrary agreement of the partners.

The Act would also be clarified by the Committee's suggestion that it be expressly provided that an expelled partner does not have the power to compel liquidation. Furthermore, adding to section 38(1) the "holding harmless" of an expelled partner as an alternative to "discharge" from partnership liabilities is endorsed, as an expelled partner should not be able to compel liquidation because of the inability of the other partners to secure a discharge of partnership liabilities. The suggested change will normally allow the remaining partners to avoid liquidation by agreeing to hold the expelled partner harmless from partnership liabilities.

The present Act gives to continuing partners, after wrongful dissolution, the right to possess partnership property only during what had been "the agreed term for the partnership." It is the Committee's recommendation that this limitation be deleted.[54] I concur. Once the continuing partners have paid for the interest of the partner who wrongfully caused dissolution, they should without question be able to possess the partnership property for as long as they desire, and the withdrawing partner should not have the right to cause liquidation of the business after the originally agreed upon term expires. The Committee, however, failed to address what should be one exception to their suggested change.

> by the court, and to be released from all existing liabilities of the partnership; but in ascertaining the value of the partner's interest the value of the good-will of the business shall not be considered.

UNIF. PARTNERSHIP ACT § 38, 6 U.L.A. at 456.

52. *Proposed Revisions*, *supra* note 3, at 173-75.

53. *Id.* at 173.

54. *Proposed Revisions*, *supra* note 3, at 175.

The exception I recommend is designed to protect the outgoing partner in those situations where the financial condition of the partnership and the continuing partner(s) is such that the outgoing partner is not adequately protected from partnership liabilities by the indemnification agreement. When this has been demonstrated to a court, the court should be empowered to compel liquidation at the expiration of the originally agreed upon term in order to lessen the outgoing partner's exposure to ongoing risk. The Act should be amended to enable an appropriate court to grant such relief under the circumstances described. The Act should require that this power be exercised in a manner that affects an equitable balancing of interests between the outgoing partner and the continuing partners.

The final more significant recommendation of the Committee with which I agree is to delete from section 38(2)(c)(II) the mandatory exclusion of the value of the goodwill of the business in ascertaining the value of the interest of a partner who has wrongfully caused dissolution.[55] The Committee does not state its reasons for this recommendation. However, since the Act already provides that the partner who wrongfully caused dissolution is liable for damages,[56] the loss of the value of goodwill does not serve a legitimate compensatory purpose. It is a windfall to the continuing partners. Furthermore, as used by the Act, the word wrongful (in wrongful dissolution) does not necessarily imply malice. For business or personal reasons, a partner may need to terminate a business relationship before the called-for termination date. He or she should be and is responsible for resultant damages, but there is no good reason to require punishment in addition. Since the loss of value of goodwill does not serve a compensatory or justifiable punitive purpose, in ascertaining the value of the interest of the partner who wrongfully causes dissolution, the mandatory exclusion of the value of goodwill should be deleted.

Section 38 should be amended in two important respects which were not addressed by the Committee. The present Act does not provide for, and the amendments suggested by the Committee do not provide for, reasonable results where there has been a total failure of consideration relative to the partnership agreement. A breach of contract which constitutes a total failure of consideration should result in forfeiture of all interest in the partnership. There are factual situations where a "partner's" actions in breach of the agreement should cause more severe consequences than those provided for by the Uniform Partnership Act. Assume that a partnership agreement called for contributions of capital

---

55. *Proposed Revisions*, *supra* note 3, at 175.
56. UNIF. PARTNERSHIP ACT § 38(2)(a)(II), 6 U.L.A. at 456.

and services by each of three partners and that two of them fulfilled their obligations while the third did not perform at all. Dissolution would normally be sought for a willful and persistent breach under section 32, which the Committee specifically recommends be considered wrongful dissolution under section 38.[57] Assume further that a successful business is being carried on by the partners who have not breached the agreement. Under section 38 of the present Act, with no change recommended by the Committee, the party who breached the agreement is entitled to an interest in the business, less damages. However, under these circumstances, the breaching party should not have any right at all to an interest in the partnership, and in addition, he or she should be liable for damages.

Outside of partnership law, a court would find that this scenario amounted to a total failure of consideration, and the other parties would have no obligation to perform their promises. This total failure of consideration would be a legal excuse for the non-breaching parties not to perform their obligations. Yet it has been held under the Uniform Partnership Act that once a partnership has been found to exist, the fact that one partner has failed to make the required contribution is not reason to compel a forfeiture.[58] However, under the facts assumed above, it is not reasonable to find that a partnership existed. The party who breached should have no claim to an interest in the partnership.[59] The situation presented by these assumed facts is not addressed by the Committee, and it should be. The Uniform Partnership Act should be amended to provide that where there has been a total failure of consideration as to a partner's contribution, the breaching party should not be entitled to any interest in the partnership. In addition, of course, the breaching party should be liable for whatever actual damages are proven.

When dissolution is caused wrongfully, each partner who did not cause such dissolution has a right to damages for breach of the agreement.[60] The Act does not provide for mitigation of damages, and the Committee has failed to recommend a requirement of mitigation. However, a revised Uniform Partnership Act should provide that this right to damages be modified by requiring the same mitigation of damages as would exist in an ordinary breach of contract action. The need to apply the principle of mitigation of damages is illustrated by a 1982

---

57. *Proposed Revisions*, *supra* note 3, at 173.

58. Thompson v. McCormick, 149 Colo. 465, 370 P.2d 442, 446 (1962).

59. *See* Staszak v. Romanik, 690 F.2d 578 (6th Cir. 1982). The United States Court of Appeals for the Sixth Circuit held that where there was a partial failure of consideration the breaching party was entitled to a partner's share of partnership assets.

60. Unif. Partnership Act § 38(2)(a)(II), 6 U.L.A. at 456.

Missouri decision.[61] It was the purpose of a partnership to obtain buyers for seven tracts of land that the partnership had under contract to purchase. The plan was to establish contracts for sale so that as soon as a closing took place as to one parcel, there could be an immediate profitable resale. Each of three partners were to share equally in expenses and profits. Plaintiff, one of the partners, agreed to personally purchase one of the tracts. The three partners were partially successful in finding buyers for the other tracts. There was a disagreement among the partners, and the court found that the plaintiff wrongfully breached the partnership agreement, causing a dissolution of the partnership. The defendants cross-claimed for damages based on lost profits as a result of plaintiff's wrongful breach. It was plaintiff's position that defendants failed to prove that the lost profits were a direct and proximate result of plaintiff's breach because no damages would have been sustained if defendants had proceeded with the purchase and sale of the tracts. Under a strict reading of the Uniform Partnership Act, the court rejected this argument.[62] The court held, "[t]he practical effect of adopting this position would be to impose a duty upon the defendants to continue the partnership business if there was a reasonable certainty that it will be profitable."[63] The court refused to impose this duty.

The argument rejected by the court is no more than the sound principle of mitigation of damages that would be required outside of current partnership law. Under contract law, a party who has been wronged by a breach generally may not unreasonably remain inactive and allow damages to mount. Damages that the wronged party should have foreseen and that could have been avoided by reasonable effort and without undue risk or expense cannot be recovered.[64] Instead there is a requirement that reasonable steps be taken to lessen damages and if those steps are not taken, damages are not recoverable. This duty to mitigate damages is just as logical and reasonable in connection with an action for breach of a partnership agreement as it is in connection with the breach of any other agreement. In the suit regarding breach of a partnership agreement discussed above, it does not appear that it would have been unduly burdensome to require the non-breaching partners to fulfill the partnership contracts and thereby prevent the loss. Instead of acting to prevent the loss, they unjustifiably allowed this loss to occur and then sought its recovery from their former partner.

Section 38 of the Uniform Partnership Act should be amended to adopt for partnership law the well-reasoned contract principle of miti-

---

61. Ohlendorf v. Feinstein, 636 S.W.2d 687 (Mo. App. 1982).
62. *Id.* at 690.
63. *Id.*
64. RESTATEMENT (SECOND) OF CONTRACTS § 350 (1981).

gation of damages. Specifically, section 38(2)(a)(II) should be amended to provide that the innocent partner's right to recover damages from a partner who has caused dissolution wrongfully is subject to a duty to mitigate damages that should have been foreseen and could have been avoided by reasonable effort and without undue risk or expense.

VIII. Rules for Distribution in the Event of Insolvency, Section 40(d)

The Committee failed to address a matter that I believe should be changed or at least clarified with respect to contributions by partners to satisfy liabilities in the event of insolvency of some partners, or their absence from the jurisdiction. The portion of the Act involved is Section 18(a)[65] as modified by Section 40(d).[66] By virtue of Section 18, its introductory paragraph and sub paragraph (a), during the operation of the partnership, *unless the parties have agreed otherwise*, they share equally in profits. Again, during the operation of the partnership, unless they have agreed otherwise, the parties share losses according to their share of profits. The parties are permitted by their agreement to share profits in one ratio and losses in another ratio. Section 40 specifically addresses the settling of accounts between the partners after dissolution. Section 40, like Section 18, allows the parties to vary its rules by agreement among themselves. Because Section 40 establishes *separate rules* for settling accounts between the partners after dissolution, it is a fair inference that the Act expects that the parties, if they wish to vary from the rules of the Act concerning settling accounts after dis-

---

65. Unif. Partnership Act § 18(a), 6 U.L.A. at 213 provides:

Sec. 18. Rules Determining Rights and Duties of Partners.

The rights and duties of the partners in relation to the partnership shall be determined, subject to any agreement between them, by the following rules:

(a) Each partner shall be repaid his contributions, whether by way of capital or advances to the partnership property and share equally in the profits and surplus remaining after all liabilities, including those to partners, are satisfied; and must contribute towards the losses, whether of capital or otherwise, sustained by the partnership according to his share in the profits. . . .

66. Unif. Partnership Act § 40(d), 6 U.L.A. at 469 provides:

Sec. 40. Rules for Distribution.

In settling accounts between the partners after dissolution, the following rules shall be observed, subject to any agreement to the contrary:

. . . .

(d) The partners shall contribute, as provided by section 18(a) the amount necessary to satisfy the liabilities; but if any, but not all, of the partners are insolvent, or, not being subject to process, refuse to contribute, the other parties shall contribute their share of the liabilities, and, in the relative proportions in which they share the profits, the additional amount necessary to pay the liabilities.

solution, will do so separately and specifically. Let us suppose that the parties do not in their agreement address that issue separately and specifically. Let us also suppose that the parties in their agreement, pursuant to Section 18(a), had provided that the parties would during the operation of the partnership share profits in one ratio and losses in a different ratio. Now, by virtue of Section 40(d), after dissolution if one of the partners is insolvent, or is not subject to process and refuses to contribute, and the liabilities of the business exceed its assets, the other partners must contribute their share of the liabilities and *according to Section 40*, they must contribute the additional amount not paid by the insolvent or out-of-jurisdiction partner "*in the relative proportions in which they share the profits.*"[67]

It is submitted that under the circumstances described, most parties would intend and expect that these losses be shared *in accordance with the ratio in which the parties had agreed to share losses* in general, and not in the proportions in which they share profits. Concepts of justice and fairness would lead to the same conclusion. In an amended Uniform Partnership Act, Section 40(d) should be changed to so provide.

IX. Conclusion

The Uniform Partnership Act has governed the partnership form of business organization in most of this country for many years. It is very much in need of revision. The movement toward revision is finally underway. Much analysis and discussion is needed in order to facilitate the achievement of a fair and efficient regulation of the rights of the participants in future partnerships. It is hoped that this Article will make a substantial contribution to that process.

---

67. Unif. Partnership Act § 40(d), 6 U.L.A. at 469 (emphasis added).

The Sentencing Court's Discretion to Depart Downward in Recognition of a Defendant's Substantial Assistance: A Proposal to Eliminate the Government Motion Requirement

Cynthia K.Y. Lee*

I. Introduction

Whether a sentencing court can depart downward from the applicable sentencing guidelines in recognition of a defendant's substantial assistance without a government motion requesting such a downward departure is a hotly disputed issue. Section 5K1.1 of the federal sentencing guidelines and 18 U.S.C. § 3553(e) specify that "upon motion of the government," the court may depart from the guidelines or statutory minimum to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Section 5K2.0 of the sentencing guidelines and 18 U.S.C. § 3553(b) suggest that the sentencing court has the discretion to depart from the guidelines without such a government motion.[1]

The courts have not reached a consensus on whether a government motion is absolutely necessary before a sentencing court can depart downward for substantial assistance, although two circuit courts have suggested that a court may, in exceptional circumstances, depart without such a government motion.[2] This judicial reluctance to do away with the requirement of a government motion may stem from a fear that eliminating the requirement may cause a reversion to the pre-guidelines days when judges had extremely broad discretion in sentencing. It may also reflect the belief of the appellate courts that strict adherence to the rules reflected in the sentencing guidelines is necessary to avoid the widespread sentencing disparity which was prevalent in those pre-guidelines days.

This Article examines the tension between discretion and rules, and proposes that the requirement of a government motion before a sentencing court can depart downward in recognition of a defendant's substantial assistance can be eliminated without jeopardizing the goals of the sen-

---

* A.B. with distinction from Stanford University 1983; J.D. Boalt Hall School of Law 1989; current law clerk to Chief Judge Harold M. Fong, United States District Court for the District of Hawaii.

1. *See infra* notes 24-25 and accompanying text.
2. *See infra* note 45.

tencing guidelines. Part one of the Article explores the historical background leading to the creation of the sentencing guidelines. Part two describes the relevant guidelines provisions and statutory sections, and provides a summary of different judicial interpretations of these sections. Part three proposes that section 5K1.1 be amended to eliminate the requirement of a government motion, and discusses the implications of such an amendment.

II. Historical background

A. Pre-Guidelines: Era of Discretion

The tension between discretion and rules has been a powerful force motivating the creation of the sentencing guidelines. Before the guidelines were implemented, judges had extremely broad discretion in sentencing. A sentencing judge could impose any sentence he or she felt was appropriate as long as the sentence imposed did not exceed the statutory maximum.[3] The judge was not required to articulate the reasons for his sentencing decision, and the length of the sentence was not subject to appellate review.[4]

In *Williams v. New York*,[5] the United States Supreme Court applauded the American tradition of giving courts wide discretion in sentencing.[6] The Court explained that such discretion was necessary in order to individualize the sentencing process, to ensure that the appropriate sentence was imposed.[7] The tone set by the Supreme Court in *Williams* remained the prevailing view until the early 1970s when critics began to question whether such broad discretion produced the fairest sentences.

The biggest problem with the pre-guidelines system of broad discretion in sentencing was that it led to disparate treatment for similarly situated individuals.[8] Sentencing disparity, or "the imposition of unequal

---

3. Under the old indeterminate sentencing system, the sentencing judge had complete control over the sentencing process. The judge could impose any sentence he or she deemed appropriate as long as the sentence imposed did not exceed the statutory maximum. Weigel, *The Sentencing Reform Act of 1984: A Practical Appraisal*, 36 UCLA L. Rev. 83, 89 (1988).

4. *Id.* Requiring judges to provide some justification for their imposed sentences helps to assure that judges do not abuse their discretion in sentencing. *Id. See also* Note, *Pennsylvania Supreme Court Review, 1988, Judicial Discretion in Sentencing-Commonwealth v. Devers*, 519 Pa. 88, 546 A.2d 12 (1988), 62 Temp. L. Rev. 729, 731-32 (1989).

5. 337 U.S. 241 (1949).

6. *Id.* at 246.

7. *Id.* at 247-48.

8. This conclusion has been supported by a number of sentencing studies. In one study conducted in 1974, fifty judges given facts from identical cases were asked to indicate

sentences on defendants similarly situated with respect to their offenses of conviction and prior criminal record,"[9] could be caused by personality factors peculiar to the sentencing judge.[10] It could also be caused by differing philosophies as to the purpose of sentencing.[11] One judge might impose a long prison sentence, believing that incapacitation or deterrence is the primary goal of sentencing, while another judge, facing similar facts, might decide that probation is the more appropriate sentence if he believes the primary goal of sentencing is rehabilitation.[12]

In the early 1970s, Judge Marvin Frankel criticized "the almost wholly unchecked and sweeping powers we give to judges in the fashioning of sentences."[13] Frankel pointed out that federal judges come to the bench with very little training on how to sentence.[14] Many judges have very little prior contact with criminal sentencing proceedings during their years of practice.[15] Those with exposure to criminal law generally have worked as prosecutors before being appointed to the bench.[16] Frankel noted that the system of sentencing then in effect did not require the sentencing judge to articulate the reasons for his sentence even though "the giving of reasons helps the decision-maker himself in the effort to be fair and rational."[17]

---

the sentences they would impose. The responses ranged from twenty years imprisonment and a $65,000 fine to three years imprisonment and no fine. Ogletree, *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938, 1944 n.38 (1988) (citing S. REP. No. 225, 98th Cong., 2d Sess. 37, 41, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3220, 3221).

9. Comment, *Sentencing Guidelines: Issues Confronting Appellate Courts*, 67 OR. L. REV. 871, 871 (1988). *But compare* Lowe, *Modern Sentencing Reform: A Preliminary Analysis of the Proposed Federal Sentencing Guidelines*, 25 AM. CRIM. L. REV. 1, 9 (1987) (asserting that "there is no single definition of disparity in sentencing").

10. Studies have found that judges with working class backgrounds tend to impose harsher sentences although young, well educated judges tend to be more lenient. Lowe, *supra* note 9, at 11 n.54.

11. *Weigel, supra* note 3, at 98-99. Section 3553 of the Sentencing Reform Act of 1984 sets out the four underlying purposes of sentencing:

> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with the needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

18 U.S.C. § 3553(a)(2) (1988). Depending on their particular philosophy regarding the predominant purpose(s) of sentencing, different judges may sentence differently even when faced with identical facts.

12. Weigel, *supra* note 3, at 98-99.

13. M. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 5 (1973).

14. Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1, 6 (1972).

15. *Id.*

16. *Id.*

17. *Id.* at 9.

As a means of remedying the problem of widespread sentencing disparity and checking the uncontrolled discretion of sentencing judges, Frankel proposed implementing a system of sentencing guidelines.[18] Frankel's criticism of the old system of discretion started the movement for reform of the sentencing process, and was a catalyst for the creation of the Sentencing Commission and the system of sentencing guidelines which we have today.[19]

B. The Sentencing Guidelines: Era of Rules

In response to the growing public concern over sentencing disparity, Congress enacted the Sentencing Reform Act of 1984.[20] The Act established the United States Sentencing Commission. The purpose was to draft sentencing guidelines that would:

> provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices.[21]

Under the sentencing guidelines, a judge can systematically apply the guideline rules to come up with a guideline range. The guideline range is a predetermined minimum and maximum term of imprisonment within which the sentencing judge can sentence an offender. The guideline range is designed to take into account the crime of conviction, particular characteristics of the crime and the offender, as well as the offender's past convictions. Because all persons convicted of similar crimes who exhibit similar characteristics become subject to the same guideline range, the sentencing guidelines, if followed, reduce disparity in sentencing by confining the judge's discretion to the guideline range.

To calculate the appropriate guideline range, the sentencing judge must start by looking up the statute of conviction in the statutory index (Appendix A). The index will lead the judge to a section in chapter 2 of the sentencing guidelines. Chapter 2 organizes the most commonly

---

18. *Id.* at 51.

19. *See* Ogletree, *supra* note 8, at 1942.

20. The Sentencing Reform Act of 1984 was enacted on Oct. 12, 1984 as Chapter II of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473. The Act is codified in 18 U.S.C. §§ 3551-86, 3621-25, 3742 (1988) and 28 U.S.C. §§ 991-98 (Supp. V 1987).

21. 28 U.S.C. § 991(b)(1)(B) (Supp. V 1987).

used federal criminal statutes under nineteen headings, such as "Offenses Against the Person," and "Offenses Involving Drugs." Occasionally, there will be more than one referenced sentencing guidelines section. In such cases, the sentencing judge must review the different sections and determine which one is most appropriate.

Once the judge locates the appropriate guideline section in chapter 2, he must find the "base offense level" for the crime of conviction. If any "specific offense characteristics," such as use or threat of force, or use of a firearm, exist, the judge must add points to (or in some cases subtract points from) the base offense level to come up with an "adjusted base offense level."

Next, the sentencing judge must determine if any "adjustments" from chapter 3 of the guidelines apply. These include adjustments either upwards or downwards for special circumstances such as a vulnerable victim, obstruction of justice, and acceptance of responsibility. These adjustments are added to or subtracted from the adjusted base offense level to come up with the total adjusted offense level.

Next, the judge determines the offender's criminal history category by looking in chapter 4 of the sentencing guidelines. The criminal history category is calculated based on the offender's past conviction record.

Finally, the judge can determine the appropriate guidelines range by consulting the sentencing table on page 5.2 of the guidelines. The vertical axis of the sentencing table consists of offense levels. The horizontal axis of the sentencing table consists of various criminal history categories. The intersection of the offense level and the criminal history category displays the appropriate guideline range in months of imprisonment. The sentencing judge can then sentence the offender within the guideline range with little fear of being reversed. Only if the judge departs from the guidelines, sentencing the offender to a prison sentence greater than the maximum or less than the minimum terms specified in the calculated guideline range, may the sentence of the court be subject to appeal by either the government or the defendant.[22]

C. Sentencing Discretion Under the Guidelines: The Authority of the Court to Depart

The drafters of the sentencing guidelines sought not only to eliminate unwarranted sentencing disparities, but also "to maintain sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of

---

22. 18 U.S.C. § 3742 allows either the government or the defendant to appeal any imposed sentence that departs from the applicable guideline range.

general sentencing practices."[23] As section 5K2.0 of the sentencing guidelines provides:

> Under 18 U.S.C. § 3553(b) the sentencing court may impose a sentence outside the range established by the applicable guidelines, if the court finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." Circumstances that may warrant departure from the guidelines pursuant to this provision cannot, by their very nature, be comprehensively listed and analyzed in advance. The controlling decision as to whether and to what extent departure is warranted can only be made by the court at the time of sentencing. . . . [T]he court may depart from the guidelines, even though the reason for departure is listed elsewhere in the guidelines, (*e.g.*, as an adjustment or specific offense characteristic), if the court determines that, in light of unusual circumstances, the guidelines level attached to that factor is inadequate.[24]

Similarly, 18 U.S.C. § 3553(b) allows a court to depart from the applicable sentencing guidelines if the court finds there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines. Section 3553(b) provides:

> (b) *Application of Guidelines in Imposing a Sentence.*—The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission.[25]

Some critics have said that section 5K2.0 of the sentencing guidelines opens the door to letting judges sentence offenders in whatever way they choose just as they did in the pre-guidelines days.[26] A creative judge

---

23. 28 U.S.C. § 991(b)(1)(B).

24. UNITED STATES SENTENCING COMM'N, FEDERAL SENTENCING GUIDELINES MANUAL § 5K2.0 (West 1990) [hereinafter GUIDELINES].

25. 18 U.S.C. § 3553(b) (1988).

26. Lowe, *supra* note 9, at 36 (asserting that "[j]udges will deviate from the presumptive outcome whenever they feel compelled to do so under the circumstances").

can theoretically devise valid reasons to depart by thinking up circumstances which were not adequately taken into account by the Sentencing Commission.[27]

The more prevailing view, however, seems to be that the sentencing guidelines provide sufficient checks to limit the discretion of the sentencing judge.[28] United States District Court Judge Jack B. Weinstein believes that, in general, federal judges will comply with the sentencing guidelines for two reasons. First, the sentencing guidelines provide a uniform national front which serves to deter unlawful conduct by publicizing the sentences that will be imposed for certain crimes.[29] Second, adherence to the guidelines reduces internal stress on judges. Not only can a judge almost assuredly avoid reversal by sentencing within the guidelines, but he or she can rule "under the illusion that he or she is no longer personally responsible for a sentencing decision."[30]

More concrete checks on the discretion of the sentencing court are provided by statute. Title 18, section 3553(c) of the United States Code requires the court to provide a statement of reasons to support any sentence departing from the guidelines. Furthermore, section 3742 of title 18 of the United States Code allows either the government or the defendant to appeal any departure sentence. Overall, these incentives to the sentencing court to sentence within the guidelines may impede the willingness of the sentencing court to depart, even when departure might produce the fairest result.

These new statutory restrictions coupled with the enormous emotional burden that is lifted from a sentencing judge's shoulders when she or he sentences within the guideline range encourage judges to exercise their sentencing authority within the structured limits of the sentencing guidelines. A judge concerned with reversal by an appellate court is unlikely to depart given these restrictions. Indeed, a compliance study conducted by the Sentencing Commission after the United States Supreme Court

---

27. The guidelines do not appear to have adequately taken into account several factors. For example, a court might depart under section 5K2.0 based upon the good that a defendant has done in his lifetime, the fact that the defendant's job will be lost and he is unlikely to obtain another, making rehabilitation after release difficult, extreme illness of a dependent requiring the presence of the defendant at home, health problems of the defendant that make imprisonment particularly inappropriate, the fact that the defendant is very elderly, the defendant's leadership role in the community, the significance of defendant's business in the community, or the immaturity of a particular defendant. Weinstein, *A Trial Judge's First Impression of the Federal Sentencing Guidelines*, 52 ALB. L. REV. 1, 16 (1987).

28. *See, e.g.*, Lindemann, *Opening the Federal Sentencing Guidelines to Alternatives*, 15 WM. MITCHELL L. REV. 555, 600-01 (1989); Weinstein, *supra* note 27, at 10.

29. Weinstein, *supra* note 27, at 10.

30. *Id.*

upheld the constitutionality of the sentencing guidelines in *United States v. Mistretta*[31] found that 81.1% of all sentences imposed nationwide in a nine month period fell within the guideline range.[32]

Given these low incentives for a sentencing court to depart, the Sentencing Commission's goals of reducing unwarranted sentencing disparity and providing certainty in sentencing[33] are likely to be accomplished. The Sentencing Commission's additional goals of providing fairness in sentencing and maintaining sufficient flexibility to permit individualized sentences,[34] however, may be undercut if judges decline to depart out of fear of being reversed, even when they believe departure is warranted.

While unchecked discretion and a return to the pre-guidelines days of unstructured discretion in sentencing is certainly not desired, the exercise of limited discretion is necessary even under the new sentencing guidelines. The Sentencing Commission recognized this need for sentencing judges to depart occasionally when it drafted the goals of the sentencing guidelines.[35] Accordingly, the Commission drafted several departure sections authorizing the sentencing court to depart from the guidelines.[36] Even with these departure sections, however, sentencing courts, by and large, have declined to depart.[37]

III. Downward Departures for Substantial Assistance

Title 18, section 3553(e) of the United States Code gives a district court limited authority to impose a sentence below the statutory minimum to reflect a defendant's substantial assistance to the government. It

---

31. 109 S. Ct. 647 (1989).

32. Report on Compliance and Departures Through End of Fiscal Year 1989 (Jan. 19, 1989 - Sept. 30, 1989) [unpublished report]. The report was based on a study of a 25% random sample of cases sentenced pursuant to the Sentencing Reform Act during the period from Jan. 19, 1989 through Sept. 30, 1989. Out of a sample of 3,260 cases, 2,806 (or 81.1%) courts sentenced within the applicable guideline range. In 5.7% of the cases, the sentencing court departed downward based on a motion by the government for a reduced sentence based on the defendant's substantial assistance to authorities. In 3.4% of the cases, the court departed upward, giving a sentence above the guideline range. In 9.7% of the cases, the court departed downward for other reasons.

33. *See supra* note 21 and accompanying text.

34. *Id.*

35. *Id.* (goals of fairness and individual consideration in sentencing).

36. *See* Guidelines, *supra* note 24, § 5K2.0 (authorizing departure if sentencing court finds aggravating or mitigating circumstances of a kind not adequately taken into consideration by the Sentencing Commission in fashioning the guidelines); Guidelines, *supra* note 24, § 5K1.1 (authorizing departure for a defendant's substantial assistance to authorities upon government motion).

37. *See supra* note 32.

includes an express requirement that the government make a motion requesting a departure before the sentencing court may depart downward:

> (e) Limited Authority to Impose a Sentence Below a Statutory Minimum.—Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.[38]

The sentencing guidelines contain a similar provision. Section 5K1.1 of the guidelines provides that a sentencing court may depart from the guidelines *upon motion of the government*. It reads:

> Substantial Assistance to Authorities (Policy Statement)
>
> Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.[39]

The Sentencing Commission has suggested informally that courts may depart downward even without a government motion and have pointed to sentencing guidelines section 5K2.0 and 28 U.S.C. § 994(n) as provisions supporting such departures. These sections, however, are inadequate bases to support section 5K1.1 departures without a government motion.

Section 5K2.0 of the sentencing guidelines, like 18 U.S.C. § 3553(b), allows the sentencing court to depart only if the aggravating or mitigating circumstance supporting the departure is "not adequately taken into consideration by the Sentencing Commission" in formulating the guidelines.[40] The Eighth Circuit Court of Appeals, in a recent opinion entitled *United States v. Justice*,[41] held that a defendant's substantial assistance to authorities was not a mitigating circumstance of a kind "not adequately taken into consideration by the Sentencing Commission in formulating the guidelines" within the meaning of 18 U.S.C. § 3553(b) since section 5K1.1 of the sentencing guidelines already deals with a defendant's

---

38. 18 U.S.C. § 3553(e) (1988).
39. GUIDELINES, *supra* note 24, § 5K1.1.
40. *See supra* notes 23-25 and accompanying text.
41. 877 F.2d 664 (8th Cir. 1989).

substantial assistance.[42] The holding of the court in *Justice* suggests that section 5K2.0, which parallels 18 U.S.C. § 3553(b), does not give the court discretion to depart downwards for substantial assistance without a government motion.[43]

Section 994(n) of title 28 of the United States Code,[44] the second suggested basis to support a downward departure for a defendant's substantial assistance without a government motion, provides that the guidelines may go below a statutory minimum to take into account a defendant's substantial assistance. Section 994(n), however, does not address the dilemma of the sentencing court of whether it has the authority to depart from the guidelines without a government motion.

Given the lack of statutory authority allowing a sentencing court to depart in recognition of a defendant's substantial assistance without a government motion, district courts have had to rely on judicial interpretation to define the boundaries of permissible behavior. To date, no federal court of appeals has held that a federal district court may depart downward from the applicable guideline range to reflect a defendant's substantial assistance without a government motion. Some circuit courts have suggested the opposite - that the sentencing court *cannot* depart downward for substantial assistance *unless* the government makes a motion - by affirming district court refusals to depart without a government motion.[45] Other courts have suggested that a sentencing court can, in limited circumstances, depart downward without a government

---

42. *Id.* at 666.

43. What the Eighth Circuit failed to note is that section 5K2.0 explicitly states that "[t]he court may depart from the guidelines, *even though the reason for departure is listed elsewhere in the guidelines.*" Ironically, the *Justice* opinion is one of the leading cases criticizing the section 5K1.1 requirement of a government motion, and does suggest that in exceptional circumstances, the sentencing court may depart in recognition of a defendant's substantial assistance without a government motion. *Id.* at 668-69.

44. Section 994(n) provides:

> (n) The Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.

28 U.S.C. § 994(n).

45. *See, e.g.,* United States v. Huerta, 878 F.2d 89 (2d Cir. 1989) (affirming district court's refusal to depart downward for substantial assistance without a government motion); United States v. Ayarza, 874 F.2d 647 (9th Cir. 1989) (affirming district court's imposition of a sentence within the applicable guideline range over defendant's constitutional challenges to the sentencing guidelines); United States v. Musser, 856 F.2d 1484 (11th Cir. 1988) (rejecting appellants' constitutional challenges to 18 U.S.C. § 3553(e) and FED. R. CRIM. P. 35(b) on equal protection, due process and separation of powers grounds).

motion,[46] but no appellate court has found the appropriate case to actually rule on this issue.

A. Circuit Court Opinions

1. Second Circuit—United States v. Huerta.—In *United States v. Huerta*,[47] the Second Circuit Court of Appeals affirmed the refusal of the district court to depart downward from the applicable guideline range without a government motion on the ground that 18 U.S.C. § 3553(e) and Sentencing Guidelines § 5K1.1 "unambiguously limit the discretion of a judge to impose a sentence below the statutory minimum on grounds of the defendant's cooperation to cases in which the government makes a motion requesting such a departure."[48]

The *Huerta* court rejected all of the appellant's constitutional challenges to the provisions requiring a government motion. First, the appellant argued that the requirement of a government motion violated the separation of powers doctrine since it delegated to the prosecutorial arm of the Executive Branch the authority to control when the judiciary could consider a defendant's cooperation with the government as a mitigating factor. The *Huerta* court, however, held that the requirement of a government motion did not violate the separation of powers doctrine because sentencing is not an inherently or exclusively judicial function. The court explained that since Congress has the power to eliminate all judicial discretion in sentencing by establishing mandatory sentences, Congress can also limit the discretion of the sentencing court by requiring a government motion.[49]

The court then rejected the appellant's due process challenge to section 3553(e). Appellant argued that section 3553(e) violated due process by allowing prosecutors unlimited and unreviewable discretion in deciding whether to make substantial assistance motions and by curtailing a judge's ability to consider evidence of cooperation. The *Huerta* court held that there was no due process violation, reasoning that "there is no right to individualized sentencing, and Congress may constitutionally prescribe

---

46. *See, e.g.*, United States v. White, 869 F.2d 822, 829 (5th Cir. 1989) (section 5K1.1 "does not preclude district court from entertaining a defendant's showing that the government is refusing to recognize [the defendant's] substantial assistance"); United States v. Justice, 877 F.2d 664, 669 (8th Cir. 1989) ("in an appropriate case the district court may be empowered to grant a departure notwithstanding the government's refusal to motion the sentencing court if the defendant can establish the fact of his substantial assistance to authorities").

47. 878 F.2d 89 (2d Cir. 1989).

48. *Id.* at 91.

49. *Id.* at 93.

mandatory sentences or otherwise constrain the exercise of judicial discretion."[50]

The *Huerta* court suggested that the discretion of a sentencing court is not completely circumscribed by the requirement of a government motion pursuant to section 3553(e) because the court can always consider a defendant's cooperation in determining a defendant's sentence, with or without a government motion, as long as it applies a sentence within the applicable guideline range. The court stated: "[W]e note that section 3553(e) does not foreclose a sentencing court from considering a defendant's cooperation as a mitigating factor in deciding what sentence *within the applicable range designated by the Guidelines* is appropriate, whether or not the government agrees."[51] This acknowledgement, however, does not provide much comfort to district courts faced with the situation in which they wish to depart downward from the applicable guideline range without a government motion because it only gives courts "discretion" to sentence within the guideline range.

2. Fifth Circuit—United States v. White.—In *United States v. White*,[52] the Fifth Circuit Court of Appeals affirmed orders of several district courts imposing sentences under the sentencing guidelines. Even though the Fifth Circuit affirmed the lower court orders, the *White* opinion is significant because the appellate court in this case came close to ruling that section 5K1.1 does not preclude a district court from departing downward without a government motion.

The appellants in *White* argued that by providing for a motion by the government, section 5K1.1 failed to implement the congressional directive of 28 U.S.C. § 994(n). Section 5K1.1 requires that the government file a motion before the court departs downward. Section 994(n) directs the Sentencing Commission to "assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed . . . to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense."[53]

The *White* court rejected the appellants' argument, holding that the section 5K1.1 provision was in accord with the statutory directive of section 994(n).[54] The court reached this conclusion by explaining that the policy statements contained in the sentencing guidelines are not rigid, mechanical requirements.[55] Rather they are "designed to assist the court

---

50. *Id.* at 94.
51. *Id.* at 93 (emphasis added).
52. 869 F.2d 822 (5th Cir. 1989).
53. 28 U.S.C. § 994(n).
54. 869 F.2d at 829.
55. *Id.*

in imposing an appropriate sentence."[56] While section 5K1.1 is based on the "reasonable assumption that the government is in the best position to supply the court with an accurate report of the extent and effectiveness of the defendant's assistance, . . . *[it] obviously does not preclude a district court from entertaining a defendant's showing that the government is refusing to recognize such substantial assistance.*"[57] The implication drawn from the language of the court is that a sentencing court may depart downward based on a defendant's substantial assistance even if the government refuses to recognize such assistance by filing a motion.

3. Eighth Circuit—United States v. Justice.—In a case entitled *United States v. Justice*,[58] the Eighth Circuit Court of Appeals criticized the requirement, found in 18 U.S.C. § 3553(e) and Sentencing Guideline § 5K1.1, of a government motion before a sentencing court can depart downward. Even though the *Justice* court thought the refusal by the government to file a motion in recognition of the defendant's substantial assistance was unreasonable,[59] it affirmed the refusal of the district court to grant a downward departure.[60] Therefore, the court's strong words of criticism are merely dicta.

The Eighth Circuit Court of Appeals acknowledged that section 5Kl.l and 18 U.S.C. § 3553(b) require a government motion before a court can depart for substantial assistance.[61] The court, however, noted several problems with this requirement of a government motion. "First, this arrangement places discretion that has historically been in the hands of a federal judge into the hands of the prosecutor"[62] since under these provisions the prosecutor has the discretion whether to file a motion. If the prosecutor decides not to file a motion, the court cannot depart, even if it believes the defendant has rendered substantial assistance to the government.[63] "Second, whether the prosecutor has abused his discretion in refusing to file a motion is a question that appears to be unreviewable."[64] Under the guidelines, there is no right of review or remedy if the prosecutor refuses to file a motion. Third, resolution of

---

56. *Id.*

57. *Id.* (emphasis added).

58. 877 F.2d 664 (8th Cir. 1989).

59. *Id.* at 668 ("the government's refusal to motion the court for departure under § 5K1.1 in this case seems to be unreasonable in light of its stipulation").

60. *Id.* at 670.

61. *Id.* at 667.

62. *Id.*

63. Although the judge possesses the technical authority to depart from the guidelines, this authority is so rigidly regulated by the guidelines that for all practical purposes, departure is not really an option. *See* United States v. Roberts, 726 F. Supp. 1359, 1365 n.39 (D.D.C. 1989).

64. *Justice*, 877 F.2d at 667.

the issue whether a defendant has provided substantial assistance to authorities is left to the prosecutor.[65]

In perhaps the strongest language from a federal appellate court supporting the notion that a sentencing court may depart under section 5K1.1 without a government motion, the Eighth Circuit stated, "We believe that *in an appropriate case the district court may be empowered to grant a departure notwithstanding the government's refusal to motion the sentencing court* if the defendant can establish the fact of his substantial assistance to authorities as outlined above."[66] The court concluded, "Nevertheless, we are not prepared to decide this issue based on the record currently before us."[67] Since the *Justice* court did not feel the case it had before it was an appropriate case to hold that the sentencing court should have departed downward without a government motion, it affirmed the refusal of the lower court to depart downward without such a government motion.

4. Ninth Circuit—United States v. Ayarza.—In *United States v. Ayarza*,[68] the Ninth Circuit Court of Appeals affirmed a district court's imposition of a sentence within the sentencing guidelines. The defendant appealed, challenging the constitutionality of the sentencing guidelines on separation of powers and due process grounds. The court of appeals rejected the defendant's constitutional challenges, in somewhat summary fashion, holding (1) that the district court did not err in rejecting defendant's motion for a downward adjustment in his sentence based on his substantial assistance under section 5K1.1 of the sentencing guidelines and 18 U.S.C. § 3553(e) because both of these provisions condition such a downward departure upon motion of the government - a prerequisite that was not met in this case; (2) that the requirement of a government motion does not violate the doctrine of separation of powers because the sentencing process is not an inherently judicial function, and that, even if it were, the government's authority to recommend a reduced sentence is not impermissibly obtrusive; and (3) that 18 U.S.C. § 3553(e) and section 5K1.1 do not violate defendant's constitutional right to due process because "it is rational for Congress to lodge some sentencing discretion in the prosecutor, the only individual who knows whether a defendant's cooperation has been helpful."[69]

5. Eleventh Circuit—United States v. Musser.—In *United States v. Musser*,[70] the Eleventh Circuit Court of Appeals rejected constitutional

---

65. *Id.*
66. *Id.* at 668 (emphasis added).
67. *Id.* at 669.
68. 874 F.2d 647 (9th Cir. 1989).
69. *Id.* at 653.
70. 856 F.2d 1484 (11th Cir. 1988).

challenges to 18 U.S.C. § 3553(e) and Rule 35(b) of the Federal Rules of Criminal Procedure based on equal protection, due process, and separation of powers grounds. Rule 35(b) allows a sentencing court to lower its previously imposed sentence to reflect a defendant's substantial assistance to the government. Like section 5K1.1 and 18 U.S.C. § 3553(e), it requires a government motion. Rule 35(b) provides:

> The court, on motion of the Government, may within one year after the imposition of a sentence, lower a sentence to reflect a defendant's subsequent, substantial assistance in the investigation or prosecution of another person who has committed an offense, in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code. The court's authority to lower a sentence under this subdivision includes the authority to lower such sentence to a level below that established by statute as a minimum sentence.[71]

Appellants first challenged the government motion requirement on equal protection grounds, arguing that "minor participants and those of relatively low culpability are without sufficient knowledge to avail themselves of the [departure for substantial assistance] provision."[72] The *Musser* court found that since the statute did not discriminate on the basis of race or a suspect class, the rational relation standard was the applicable standard. Because "Congress' desire to ferret out drug kingpins is obviously served by encouraging those with information as to the identity of kingpins to disclose such information," the court found a rational relationship between the statute and Congress' purpose and held that appellants' equal protection challenge to the "substantial assistance" provision was without merit.[73]

Appellants also challenged the "substantial assistance" provision on due process grounds, arguing that the requirement of a government motion delegated to prosecutors unbridled discretion to decide who is entitled to a sentence reduction. The appellate court rejected appellants' due process challenge as well, reasoning that the only authority delegated to prosecutors by the rule is the authority to *move* the district court for a reduction of sentence. The authority to actually reduce a sentence remains vested in the district court.[74] Finally, the appellants' argument that the provision violates the separation of powers doctrine was rejected summarily as without merit.[75]

---

71. FED. R. CRIM. P. 35(b).
72. *Musser*, 856 F.2d at 1487.
73. *Id.*
74. *Id.*
75. *Id.*

B. Tried Alternatives

Despite the lack of firm appellate authority to depart downward without a government motion, some district courts have dared to depart, devising ways to avoid the guidelines and statutory requirement of a government motion. Two of these methods are examined in this Article. These methods of accomplishing the downward departure without a government motion, however, are inadequate to protect a defendant's interest in a fair sentence if district courts utilizing these methods risk reversal by appellate courts unconvinced that the government motion requirement is unconstitutional. What is needed is an amendment to the guidelines that would apply universally to all sentencing courts, allowing these courts to depart downward in recognition of a defendant's substantial assistance without a government motion.

1. Treating Letters Regarding the Defendant's Cooperation From the Government to the Court as the Functional Equivalence of a Government Motion.—In *United States v. Coleman*,[76] several defendants filed a motion with the district court requesting it to order the government to file a motion to permit the district court to consider a departure, or, in the alternative, to consider a departure notwithstanding the failure of the government to file a motion.

The government had entered into a plea agreement with defendants that provided that the government would advise the sentencing court of the nature, extent, and importance of the assistance the defendants provided to law enforcement authorities.[77] The agreement, however, did not specify *how* the government would advise the sentencing court of the defendants' assistance.

The government refused to file a motion requesting departure. In a lengthy twenty-one page opinion, the district court examined 28 U.S.C. § 994(n), 18 U.S.C. § 3553(e), and section 5K1.1 of the sentencing guidelines and concluded that these provisions "*clearly contemplate that the sentencing court may be authorized to make a lower departure from the Guidelines and consider a sentence below a mandatory minimum sentence.*"[78] Interestingly, the court did not go further and insert the words "even without a government motion." The court then treated letters from the government to the court that detailed the defendants' cooperation as the functional equivalent of a motion, thereby allowing the imposition of a sentence below the applicable guideline range.[79]

The solution reached by the court in *Coleman* to the problem of a prosecutor who reneges on a promise to file a motion for downward

---

76. 707 F. Supp. 1101 (W.D. Mo. 1989).
77. *Id.* at 1118-19.
78. *Id.* at 1115 (emphasis added).
79. *Id.* at 1119-20.

departure in recognition of the defendant's substantial assistance after the defendant has provided assistance to the government pursuant to a plea agreement is not a method that most courts can follow. In *Coleman*, the prosecutor had rejected defense counsel's request that the government commit itself to filing a motion for downward departure if the defendants' cooperation proved to be substantial.[80] Instead, as part of the plea agreement, the prosecutor agreed to submit a letter to the court describing the defendants' cooperation.[81] Few, if any, plea agreements will include such a provision, especially not if prosecutors realize that district courts may treat such letters as the functional equivalent of a motion for downward departure.

2. Imposing a Duty to Act in Good Faith on the Government.— In *United States v. Galan*,[82] an unpublished district court opinion, the Southern District Court of New York ordered the government to make an *ex parte, in camera* disclosure to the court on the subject of the defendant's cooperation to allow the court to evaluate whether the government's refusal to make a motion for a downward departure was in good faith.

In *Galan*, the defendant and the government had entered into a plea agreement. The *Galan* plea agreement provided that the government would make a motion for a downward departure if the defendant cooperated with the investigation by the government. The government then refused to file such a motion because it felt the defendant had breached the plea agreement.

The *Galan* court held that under these circumstances, it could require the government to provide to the court a detailed statement of any assistance actually rendered by the defendant.[83] The court held that it could then evaluate the government's statement to determine whether the government's refusal to make a motion for downward departure was in bad faith, suggesting that either a downward departure would then be appropriate even without a government motion or that if the government refusal to make such a motion was in bad faith, the court could compel the government to file a motion.[84]

C. Policy Rationale Behind Requirement of a Government Motion

The obvious reason for requiring a government motion before a sentencing court can depart downward in recognition of a defendant's

---

80. *Id.* at 1105.

81. *Id.*

82. United States v. Galan, No. 89 Cr. 198, 1989 WL 63110 (S.D.N.Y. June 8, 1989).

83. *Id.*

84. *Id.*

substantial assistance was aptly stated by the Ninth Circuit Court of Appeals: "[I]t is rational for Congress to lodge some sentencing discretion in the prosecutor, the only individual who knows whether a defendant's cooperation has been helpful."[85] It is this belief, that the government is in the best position to know whether the defendant has rendered substantial assistance to the government, that prevents courts from simply ignoring the requirement or writing it out of the statute by judicial fiat.

There are several problems with this belief. First, the prosecutor is not the sole player with primary knowledge with respect to whether and to what extent the defendant has cooperated. The defendant also has firsthand knowledge of the amount and extent of his cooperation. Second, and more importantly, the sentencing guidelines already lodge enormous discretion in the prosecutor. The prosecutor determines to a large extent what sentence the offender ultimately receives because of its charging power.[86] For example, if an individual is arrested in possession of two ounces (fifty-six grams) of cocaine base (crack),[87] the prosecutor can charge the individual with simple possession of crack which carries a one-year maximum statutory punishment,[88] possession with intent to distribute crack which carries a twenty-year maximum statutory punishment,[89] possession with intent to distribute five grams or more of crack which has a five-year mandatory minimum,[90] possession with intent to distribute fifty grams or more of crack which has a twenty-year mandatory minimum,[91] conspiracy which carries a five-year maximum,[92] drug conspiracy involving the distribution of five grams or more of crack which carries a five-year mandatory minimum,[93] drug conspiracy involving the distribution of fifty grams or more of crack which carries a ten-year mandatory minimum and a maximum punishment of life imprisonment,[94] engaging in a pattern of racketeering which carries a twenty-year maximum,[95] conspiracy to engage in a pattern of racketeering with a twenty-year statutory maximum,[96] and/or engaging in a continuing criminal enterprise which carries a ten-year mandatory minimum and a statutory

---

85. United States v. Ayarza, 874 F.2d 647, 653 (9th Cir. 1989).
86. Weinstein, *supra* note 27, at 5.
87. *See* United States v. Roberts, 726 F. Supp. 1359, 1363 nn.15-30 (D.D.C. 1989).
88. 21 U.S.C. § 844 (1988).
89. *Id.* § 841(a), (b).
90. *Id.* § 841(b)(1)(B)(iii).
91. *Id.* § 841(b)(1)(A)(iii).
92. 18 U.S.C. § 371 (1988).
93. 21 U.S.C. §§ 846, 841(b)(1)(B)(iii) (1988).
94. *Id.* §§ 846, 841(b)(1)(A)(iii).
95. 18 U.S.C. §§ 1962(a), 1963 (1988).
96. *Id.* §§ 1962(d), 1963.

maximum of life imprisonment.[97] The prosecutor has the additional power of determining which sentencing factors the sentencing court considers by its construction of the plea agreement.[98] To add to these discretionary functions the power to control whether a sentencing court may consider a defendant's substantial assistance vests too much discretion in the hands of the prosecution, a biased player in the criminal proceeding.[99]

A second, less obvious, reason for judicial reluctance to do away with the government motion requirement may be the fear that eliminating the requirement will open the door to sentencing as it was before the guidelines took effect - largely uncontrolled sentencing discretion leading to disparate treatment of similarly situated offenders. Under the current rules, the government motion requirement provides a tangible check on the ability of the sentencing court to depart for substantial assistance. If this requirement is removed, appellate courts may fear that sentencing courts will depart downward whenever and to whatever extent they feel is appropriate using the substantial assistance provision as their justification.

These concerns are reflective of the general concerns which led to the creation of the sentencing guidelines. The tension between rules and discretion, between uniformity and proportionality, is brought into sharp focus when considering the section 5K1.1 requirement of a government motion. On the one hand, the appellate courts are legitimately worried that the good of the sentencing guidelines - eliminating unwarranted disparity and increasing certainty and uniformity in sentencing - will be unraveled if the checks on judicial discretion are too liberally removed. On the other hand, the goal of individualized sentences, proportionate to the individual offender's particular characteristics, calls for some adjustment in the current structure.[100] Both concerns can be met even if the government motion requirement is eliminated.

IV. Elimination of the Government Motion Requirement - Two Proposals to Consider

A. Proposal for a Two Level Discount

One way to deal with the concern that eliminating the government motion requirement may open the door to a reversion back to the days

---

97. 21 U.S.C. § 848 (1988).

98. Sears, *Sentencing Guidelines: Shifting Discretion from the Judge to the Prosecutor?*, 17 Colo. Law. 1, 7 (1988).

99. Note, *Pennsylvania Supreme Court Review, 1988 - Mandatory Minimum Sentencing Act, Commonwealth v. Wooten*, 519 Pa. 45, 545 A.2d 876 (1988), 62 Temp. L. Rev. 737, 744 (1989).

100. Lindemann, *supra* note 28, at 605; Weinstein, *supra* note 27, at 30.

of unchecked judicial discretion in sentencing is to allow the court to give the offender a two level discount if the court finds the offender substantially assisted the government. Such an amendment to the sentencing guidelines would parallel the current two level discount given to an offender for acceptance of responsibility.[101] Such a discount would not be automatic; the offender would bear the burden of proving (1) that he provided assistance to the government, (2) that his assistance was substantial, and (3) that his substantial assistance warrants granting him a two level discount.

The two level discount proposal appears to be a meeting ground for both types of critics, those concerned with sentencing courts having too much discretion and those concerned with courts adhering too strictly to the rules of the sentencing guidelines. On the one hand, a two level discount proposal would limit the amount of discretion a sentencing judge could exercise since the judge could only "credit" an offender with, at most, a two level adjustment. On the other hand, while the reduction of two levels would be fixed, since the two level discount would not automatically apply in every instance, whether to grant it would be a matter solely within the discretion of the sentencing judge.[102]

Actually, a proposal for a two level discount would not constitute a departure from the guidelines. The sentencing court would still be sentencing the offender within the applicable guideline range even if it applied the two level discount proposal in recognition of the defendant's substantial assistance. This two level discount proposal for substantial assistance should, therefore, be rejected because rather than solving the problem of limited judicial discretion in sentencing, it further restricts the sentencing court by limiting any possible reduction in sentence to only two levels. More than a two level discount may be warranted in particular cases, but under this proposal, the sentencing court would not be able to depart further under section 5K2.0 of the sentencing guidelines because the offender's substantial assistance would have been a circumstance already taken into account by the Sentencing Commission in fashioning the sentencing guidelines.

B. Eliminating the Government Motion Requirement

A better idea would be to merely eliminate the requirement of a government motion, thereby allowing the decision to depart downward

---

101. Under Sentencing Guidelines § 3E1.1, if the sentencing court believes that a defendant has accepted responsibility for his conduct, it may subtract two points from the adjusted offense level.

102. *But see* Wilkins, *Plea Negotiations, Acceptance of Responsibility, Role of the Offender, and Departures: Policy Decisions in the Promulgation of Federal Sentencing Guidelines*, 23 WAKE FOREST L. REV. 181, 190-92 (1988) (discussing the two level discount for acceptance of responsibility).

for substantial assistance to rest squarely with the sentencing court. Eliminating the government motion requirement is necessary to achieve the goal of fair and just sentencing. The prosecution is not and cannot be an unbiased player in the sentencing process. "The prosecutor spends a significant amount of time compiling evidence and working zealously to convict defendants on trial. . . . [T]his role makes it difficult for the prosecutor to be objective regarding the imposition of sentencing after conviction."[103] Additionally, the prosecutor already has enormous discretion under the current sentencing guidelines.[104]

In answer to the concern that the prosecutor is in the best position to know whether the defendant rendered assistance which was substantial, under this proposal the prosecutor does not lose all input into the decision whether the court will depart for substantial assistance. The prosecutor can present its reasons for opposing departure to the sentencing court. The sentencing court can then weigh the government's assessment of the defendant's assistance against the evidence presented by the defendant. The prosecutor's input is thus given adequate weight, but the ultimate decision whether a departure downward is warranted rests with the judge.

Eliminating the government motion requirement would not *add* any authority to the sentencing court which it does not already have under the current sentencing guidelines. The sentencing court currently has the authority to depart downward in an unqualified amount in recognition of a defendant's substantial assistance once the government moves for such departure. This proposal merely takes away the requirement that the government file a motion for downward departure before the court can exercise its authority.

Additionally, eliminating the government motion requirement would not lead to unbridled discretion similar to that exercised by sentencing judges prior to implementation of the sentencing guidelines. Sentencing judges would still have great incentive to sentence within the guideline range given the articulation requirement and the risk of reversal.[105] Under the proposal, the sentencing court could not depart whenever it felt like departing from the guidelines; it would have to find that a defendant rendered substantial assistance to the government in order to exercise its discretion to depart.

---

103. Note, *supra* note 99, at 744.

104. *See supra* notes 85-99 and accompanying text.

105. 18 U.S.C. § 3553(c) (1988) (requiring court to articulate reasons justifying departure); *id.* § 3742(a)(2) (allowing defendant and government to appeal a departure sentence).

V. Conclusion

Both prosecutors and defense attorneys agree that without some mechanism giving defendants who cooperate with the government special consideration in sentencing, few defendants will be willing to render such assistance.[106] Defendants who cooperate risk discovery as an informant and put their lives on the line when they give away the names of others involved in criminal activity. The provision allowing a sentencing court to depart in recognition of a defendant's substantial assistance to the government is an important provision. Its significance should not be diminished by placing the discretion whether to apply the provision in the hands of the prosecution.

---

106. Both prosecutors and defense attorneys recognize the need to give defendants who render assistance to government authorities special consideration in sentencing. Without some recognition in the form of a reward for such assistance, few defendants would be willing to cooperate. Wilkins, *supra* note 102, at 196.

FAX Unto Others. . .: A Constitutional Analysis of Unsolicited Facsimile Statutes

> He who has a thing to sell and goes and whispers in a well, is not so apt to get the dollars as he who climbs a tree and hollers.[1]

Relatively unheard of three years ago,[2] the fax[3] machine has quickly become an office necessity. The ease and speed of sending a document over telephone wires to another machine have enabled businesses to communicate with an efficiency heretofore unknown.[4]

As with other instruments of great social utility, the use of fax machines has spread rapidly. The advertising industry, in particular, has not been left behind in taking advantage of this "new"[5] fax technology. In fact, it has taken less than two years for advertisers to cash in on the widespread

---

1. Wit and Wisdom of Kraft, Inc., available at the Indiana Law Review Office.

2. Fax sales doubled in 1988. *See* Jordahl, *Plugging into the Fax Track; Facsimiles are Changing the Way Lawyers and Courts Work*, 8 CAL. LAW. 78 (Nov. 1988). In 1987, approximately 450,000 machines were sold. In 1988, that number grew to 1.1 million. Chicago Tribune, Nov. 20, 1988, at 13. Moreover, sales are expected to double again this year. *Id.* (As of June 1989, there were 2.7 million "stand alone" fax machines. Friday Report, June 2, 1989).

3. This Note will use fax and facsimile interchangeably to mean any machine that converts images into digital sounds to send over telephone lines to be reconverted into a copy of the image sent. Lipkin, *Fax Fever Slams Business Hard*, INSIGHT, Aug. 22, 1988, at 8.

4. It has also allowed businesses to conduct more international transactions. *See* Harper, *Going Global—Big Law Firms Expand Overseas*, 75 A.B.A. J. 68, 72 (1989) (describing the indispensable use of fax machines for law firms with foreign offices). *See also* Jordahl, *supra* note 2, at 78.

Even the judiciary has become dependent on the ease of faxing court papers. In fact, one judge mentioned in his opinion that he faxed his dissent to the clerk's office for filing. Richmond F. & P.R.R. v. Brotherhood of Maint. of Way Employees, 795 F.2d 1161, 1169 (1986) (Widener, J., dissenting). New York now allows service of papers on an attorney or party to be completed by fax. *See* N.Y. CIV. PRAC. L. & R. 2103 (McKinney 1989). *See also Fax Ruling Causes A Legal Stir*, Wall St. J., Nov. 22, 1988, at B2. Many other jurisdictions are considering allowing documents such as search warrants and other official police papers to be filed by the fax machine. 75 A.B.A. J. 29 (1989).

5. Facsimile technology was developed in 1842 by a Scottish clock maker, Alexander Bain. During World War II, front line commanders faxed maps and plans back to headquarters. The old machines were slow and cumbersome, often requiring more than six minutes to fax one page. *See* Lipkin, *supra* note 3, at 8; R. Ellis, Regulating Advertisement Via Fax Machine: Constitutional and Practical Aspects (comments on H.R. 2184) n.1 (May 23, 1989) (brief of testimony before the Energy and Commerce Committee, subcommittee on Tele-communications and Finance regarding H.R. 2184, a proposed ban on unsolicited fax advertisements).

use of fax machines. Advertisers are finding fax machines to be more efficient[6] and less costly to the consumer[7] than other forms of solicitation. Businesses claim that they are becoming bombarded by unsolicited facsimile transmissions.[8] However, because many people do not seem to mind receiving these advertisements,[9] the horror stories about fax machines have not yet been as widely publicized as those associated with computerized telephone solicitations.[10]

In some respects unsolicited fax messages resemble unsolicited "junk mail." Like junk mail, the fax transmission is in the box waiting to be

---

6. Mr. Fax, the company commonly associated with large scale fax advertising, claims an 8% to 12% response rate for fax ads, about triple the rate it gets for direct mailings. Katayama, *Are You Ready for Junk Fax?*, FORTUNE, Feb. 27, 1989, at 16.

7. In Pros and Cons of Legislation Against Unsolicited Fax Messages, Statement released by Evets Corp. of California, the cost to the consumer of "junk fax" is less than the cost of either "junk mail" or telephone solicitations. The cost was based on the time it took for a worker to receive a communication, determine what it is and dispose of it in the proper manner.

8. Ode, *Adjust the Fax, Please: Equipment Convenience, Speed, New Venue for Junk Mail*, Minneapolis Star Tribune, March 12, 1989, at 1E, 8E. The American Facsimile Association estimates that businesses receive an average of three to four unsolicited fax communications a week.

9. Mr. Fax, who has a toll free number for people wishing to have their fax number removed from its list, has received complaints from less than one-tenth of one percent of its customers on a data base of approximately 500,000. *Heading Off 'Junk Fax' at the Wire*, N.Y. Times, Jan. 20, 1989, at B2, col. 1 (city ed.). Says Elliott Segal, Vice President of marketing for Mr. Fax, "People really seem to enjoy dealing over the fax machine." Ode, *supra* note 8, at 9E.

Telephone solicitors, on the other hand, face a very low positive response rate. One California survey found that less than 0.1% of the respondents "liked" receiving calls made by sales people and 9.1% "did not mind" them. Field Research Corp., The California Public's Experience With and Attitude Toward Unsolicited Telephone Calls 9 (March 1978), *cited in* Nadel, *Rings of Privacy: Unsolicited Telephone Calls and the Right of Privacy*, 4 YALE J. ON REG. 99, 99 n.6. (1986).

A more direct comparison: The FCC has received only 20* complaints about unsolicited fax transmissions, compared to 8000 complaints on telephone solicitations. *Lawmakers Urge Federal Ban on Unsolicited Fax Ads*, Marketing News, May 22, 1989, at 37.

* Since that time 2 more complaints have been filed. Lentini, *Junk Fax: Advertisers May Have Worn Out Their Welcome*, Adweek, Aug. 7, 1989, at 21.

10. *See supra* note 9 and the relatively small number of complaints to the FCC. *But see* Knight, *The Junk Fax Attack: Why Maryland May Outlaw Unsolicited Advertisements*, Washington Post, May 23, 1989, at C3 (135 CONG REC. E1839-01 (daily ed. May 24, 1989) (statement of Rep. Pete Stark) (citing Knight and the case of the nuclear submarine. It seems that Mario Cuomo was awaiting an important memo on nuclear power plants from Richard Kessel, the state consumer-protection chief, but Kessel could not fax it because his machine was receiving a three-page menu from the local sandwich shop.). For complaints concerning telephone solicitations, see Note, *Give Me A Home Where No Salesmen Phone: Telephone Solicitation and the First Amendment*, 7 HASTINGS CONST. L.Q. 129, 129 n.5 (1979).

picked up; its intrusion is relatively passive.[11] Yet a fax transmission does not just passively appear in a mailbox. Once the fax transmission is in the machine, the recipient pays for the paper[12] necessary to print someone else's transmission. More significantly, while a fax machine is receiving an unauthorized transmission, no one else can use the machine.[13]

This Note will discuss: (1) the current state of the law dealing with unsolicited fax advertisements, and (2) the difficult constitutional problems which arise when attempts are made to regulate commercial speech of this type. As used in this Note, unsolicited facsimile advertisements are transmissions promoting the sale of some good, service, or property.[14] Part I of this Note traces the development of the *Central Hudson*[15] test, designed to afford intermediate constitutional protection for commercial speech, and discusses how the courts have handled state and federal regulations restricting commercial speech. Part II analyzes the four general types of state and federal limitations now being imposed upon unsolicited facsimile advertising in terms of the *Central Hudson* standard. This Note concludes that imposing reasonable limitations upon hours and pages of unsolicited transmissions will best serve the competing interests of fax advertisers and fax machine owners.

I. State Regulation of Protected Commercial Speech

Until 1976, the Supreme Court refused to recognize first amendment[16] protections for commercial speech.[17] In that year, however, the Court

---

11. Some commentators believe the better analogy is to the unauthorized use of a computer because a fax machine has memory chips and a processor similar to computers. As a result, unsolicited facsimiles are actually using someone else's computer without permission. Telephone interview with Steve Graff, staff analyst for National Conference of State Legislatures (Nov. 7, 1989).

Much has been written about regulating another analogous solicitation tool—unsolicited telephone calls. *See, e.g.,* Nadel, *supra* note 9; Note, *Regulation of Unsolicited Telephone Calls: An Argument for A Liability Rule*, V Computer L.J. 393 (1985); Note, *Commercial Speech and the Right to Privacy: Constitutional Implications of Regulating Unsolicited Telephone Calls*, 15 Colum. J.L. & Soc. Probs. 277 (1980); Note, *Unsolicited Telephone Calls and the First Amendment: A Constitutional Hangup*, 11 Pac. L.J. 143 (1979); Note, *supra* note 10.

12. It should be noted that fax paper is more expensive than regular paper, costing up to ten cents a page. Recently, however, several facsimile companies have created "plain" paper fax machines which would make the cost of paper negligible.

13. Knight, *supra* note 10.

14. *See, e.g.,* Fla. Stat. § 365.1655 (1989) (Each statute provides a definition for unsolicited facsimile advertisements; however, this is a common definition.). *See also* Part II, *Analysis of State Statutes.*

15. Central Hudson Gas & Elec. v. Public Serv. Comm'n, 447 U.S. 557 (1980).

16. The first amendment states in part that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I.

17. *See, e.g.,* Valentine v. Chrestensen, 316 U.S. 52, 54 (1942) (held that speech,

decided *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*,[18] which held that speech which does no more than propose a commercial transaction is nonetheless of such social value as to be entitled to first amendment protection.[19] In invalidating a statute making it unprofessional conduct for pharmacists to advertise drug prices,[20] the Court reasoned that most consumers have a greater interest in their daily commercial affairs than in the most urgent political issues.[21] Moreover, the proper allocation of resources in a free market economy demands that commercial decisions be well informed; consequently, the free flow of commercial information is indispensable.[22]

In *Virginia Pharmacy*, the Court declined, however, to consider how much protection commercial speech should enjoy.[23] To this end, the Court

---

17. *See, e.g.,* Valentine v. Chrestensen, 316 U.S. 52, 54 (1942) (held that speech, purely commercial in nature, is not protected under the first amendment). This commercial speech exception to the first amendment remained in force until the mid-1970's, when the Court decided two cases which severely narrowed *Valentine*. In Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 384, *reh'g denied,* 414 U.S. 881 (1973), the Court foreshadowed its retreat from the wholesale refusal to protect commercial speech by stating, in dicta, that speech does not lose its constitutional protection solely by appearing in a commercial context. Two years later, the Court returned to the issue of commercially based speech in newspaper ads in Bigelow v. Virginia, 421 U.S. 809 (1975). In dicta, the majority severely narrowed the *Valentine* commercial speech exception and expressed its dissatisfaction with the labeling approach used by the courts since *Valentine*. *Id.* at 819.

18. 425 U.S. 748 (1976).

19. *Id.* at 761-62. The Court framed the issue as: "Whether speech which does 'no more than propose a commercial transaction' is so removed from any 'exposition of ideas' and from 'truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government', that it lacks all protection." *Id.* (citations omitted). *See also Pittsburgh Press,* 413 U.S. 376; Roth v. United States, 354 U.S. 476 (1957) (the Court held that obscenity is not protected by the first amendment); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (the Court held that fighting words are outside the scope of first amendment freedoms).

The Court discussed the restriction in terms of both consumers and advertisers. "If there is a right to advertise, there is a reciprocal right to receive the advertising, and it may be asserted by these appellees." *Virginia Pharmacy*, 425 U.S. at 757. The next year, however, the Court dispelled any doubts as to whether the advertiser could challenge a commercial speech restriction in Linmark Assoc. v. Township of Willingboro, 431 U.S. 85 (1977). The case asserted the rights of advertisers to communicate, by placing "for sale" signs in their yards, even though the city had a strong interest in stopping "white flight" and keeping the community integrated.

20. *Virginia Pharmacy*, 425 U.S. at 749-50.

21. *Id.* at 763-65.

22. *Id.* at 765.

23. *Id.* at 771. "Whatever may be the proper bounds of time, place, and manner restrictions on commercial speech, they are plainly exceeded by this Virginia statute, which singles out speech of a particular content and seeks to prevent its dissemination completely." *Id.*

discussed the common-sense distinction between commercial speech[24] and other forms of speech.[25] This distinction is important, not in finding commercial speech deserving of protection,[26] but in determining the extent to which state regulation is permissible. Fifteen years later, the precise degree of first amendment protection given to commercial speech has yet to be resolved by the Court.[27]

A. Time, Place, or Manner Restrictions

In 1976, when the Court first discussed the regulation of commercial speech, it analogized such speech to the existing standard for noncommercial speech—whether the restrictions are reasonable in time, place, or

---

24. Defining commercial speech is outside the scope of this Note, but has led to a great deal of disagreement among commentators and courts alike. *See* Note, *Time, Place, or Manner Restrictions on Commercial Speech*, 52 GEO. WASH. L. REV. 127, 127 n.1. (1983) and authorities cited therein.

25. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455-56 (1978). Generally, the Court stated that commercial speech is viewed as hardier than other speech. Because advertising is the *sine qua non* of commercial profits, it is less likely to be chilled by regulation. *Virginia Pharmacy*, 425 U.S. at 771-72 n.24. A business owner is more likely to speak, even if subjected to greater restrictions, because advertising is his major source of sales, whereas a political minority might be hesitant to voice an opinion, if the means of communication were somewhat restricted. *See also* Jackson & Jeffries, *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 38-39 (1979).

Moreover, this difference between commercial and noncommercial speech inheres in both the nature of the speech and the nature of the governmental interest. CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 1086 n.15. (Killian & Costello ed., 1987 & Supp. 1989) (Authorized by Public Law 91-589, 84 Stat. 1585, 2 U.S.C. § 168) (citations omitted) [hereinafter THE U.S. CONSTITUTION: ANALYSIS AND INTERPRETATION]. The idea is that the Court will accept greater restrictions on commercial speech with less of a showing of state interest than on noncommercial speech. Additionally, the state's interest involved in commercial speech is different because the state seeks to protect the pocket books of its citizens compared to the "market place of democratic ideals" in noncommercial speech. (The pocket books being of "less" social value in the decisions of the Court).

26. The Court has recently reaffirmed its vagueness in determining to what degree commercial speech is protected stating that commercial speech is "entitled to the qualified, but nonetheless substantial protection" of the first amendment. Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 68 (1983).

27. The Court continually mentions the "commonsense" distinction between commercial speech and other protected speech; however, it has not discussed the extent of the protection available to speech "which does no more than propose a commercial transaction." *See supra* note 25 and accompanying text.

Historically, all speech, even the most fundamentally political or religious, has been subjected to certain state limitations. *See, e.g.,* Cox v. Louisiana, 379 U.S. 536, 554 (1965); Note, *supra* note 24, at 129 n.14.

manner.[28] The courts use the time, place, or manner test to determine if a governmental restriction impermissibly infringes on protected speech. If the restriction is unreasonable, then it is unconstitutional. In applying the test, the Court has outlined four requirements that time, place, and manner restrictions must satisfy. The restrictions must (1) be content neutral,[29] (2) be narrowly drawn,[30] (3) serve a significant governmental interest[31] and (4) leave open alternative channels of communication.[32] These requirements ensure that any restriction upon speech will protect the rights of the speaker while reasonably promoting the state's interests. However, when discussing commercial speech, the Court has appeared uncertain how far to extend the protection guaranteed by *Virginia Pharmacy*, mindful that no matter what course it takes, it may open a door to the future dilution of the strong protection given to political speech.[33]

In the commercial speech cases following *Virginia Pharmacy*, the Court tolerated more state regulation of speech.[34] The time, place, and manner restrictions permitted for advertising of professional services however, were more rigorous[35] than corresponding restrictions on other forms of commercial speech.[36] Nonetheless, all commercial speech restriction came to be analyzed with more tolerant, "intermediate" level scrutiny.[37] Conse-

---

28. *See supra* note 23 and accompanying text. *See generally* Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640 (1981) (noncommercial speech time, place, or manner restrictions); Grayned v. City of Rockford, 408 U.S. 104 (1972); Schneider v. State, 308 U.S. 147 (1939).

29. *See, e.g.*, Chicago Police Dept. v. Mosley, 408 U.S. 92 (1972).

30. *See, e.g.*, Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984).

31. *See, e.g.*, United States v. O'Brien, 391 U.S. 367 (1968).

32. *See, e.g.*, Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983) and cases cited therein.

33. *Central Hudson*, 447 U.S. 557, 579 (Stevens, J., concurring). *See also* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978). "To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech." *Id.*

34. *See Ohralik*, 436 U.S. 447; Friedman v. Rogers, 440 U.S. 1 (1979).

35. *Virginia Pharmacy*, 425 U.S. at 771 (a restriction on advertising of drug prices by pharmacists was invalidated because there was no connection between professionalism and advertising); Bates v. State Bar of Ariz., 433 U.S. 350, 384 (1977) (a regulation prohibiting advertising by lawyers was unconstitutional); *Ohralik*, 436 U.S. at 460 (regulation mandating discipline for in-person solicitation of clients was valid; no requirement that the restriction be narrowly tailored because of the greater tradition of state regulation in these areas, particularly the law).

36. *See* Linmark Assocs. v. Township of Willingboro, 431 U.S. 85, 93-94 (1977) (the Court refused to accept the regulation of time, place, and manner as a defense in the banning of "for sale" signs).

37. Justice Blackmun, in his concurrence in *Central Hudson*, characterized the test used by the majority as an "intermediate level of scrutiny." 447 U.S. 557, 573 (1980)

quently, less state justification was required to restrict commercial speech. In addition, other doctrines commonly associated with noncommercial speech, such as the prohibition against prior restraints[38] and the doctrine overbreadth,[39] were tempered when applied to speech purely commercial in nature.

B. The Central Hudson *Four-Part Test*

After four years of watering down the time, place, and manner standard for commercial speech, the Court formulated a "new" four-part test[40] to measure limitations on commercial speech in *Central Hudson Gas & Electric Corp. v. Public Service Commission*.[41] Under the *Central Hudson* test, a court must determine whether (1) the speech deserves to be protected by the first amendment,[42] (2) the asserted governmental interest is substantial,[43] (3) the limitation "directly" advances the asserted governmental interest[44] and (4) the limitation is more extensive than "necessary" to serve the state interest.[45] A limitation upon commercial speech is constitutionally permissible only if it passes each of these tests.

1. Is It Protected Speech?—The first part of the test determines whether the speech deserves protection.[46] This first prong is derived from

---

(Blackmun, J., concurring). This characterization has been supported by several commentators. *See* Comment, *Posadas de Puerto Rico Associates v. Tourism Company: Rolling the Dice with Central Hudson*, 40 RUTGERS L. REV. 241, 241 n.4 (1987); Note, *supra* note 24, at 137 n.66.; Note, *Constitutional Protection of Speech*, 82 COLUM. L. REV. 720 (1982).

In comparison, regulations on other types of protected speech face a much higher level of scrutiny. Note, *supra* note 24, at 137 n.66. The Court will analyze a regulation more carefully to determine if the asserted state interest is substantial when noncommercial speech is at issue.

38. *Central Hudson,* 447 U.S. at 571 n.13; *Virginia Pharmacy*, 425 U.S. at 771-72 n.24.

39. *Central Hudson*, 447 U.S. at 565 n.8; Bates v. State Bar of Ariz., 433 U.S. 350, 379-81 (1977).

40. Some commentators have likened this new test to a modification of the time, place, and manner standard. *See* Note, *supra* note 24; Note, *supra* note 37. Moreover, in San Francisco Arts & Athletics v. United States Olympic Comm., 483 U.S. 522 (1987), the Court said that the application of the *Central Hudson* test was "substantially similar" to the application of the test for validity of time, place, and manner restrictions. *Id.* at 537 n.16.

41. 447 U.S. 557 (1980).

42. *Id.* at 566 (for commercial speech, the expression must at least concern lawful activity and not be misleading).

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 563-64, 566. The Court, in reciting the facts, did not mention that the promotions used by Central Hudson were false or misleading.

the *Pittsburgh Press*[47] and *Bigelow*[48] cases, in which the Court determined that illegal or deceptive commercial speech does not deserve protection.[49] Because the Court concluded that the interest served by first amendment protection of commercial speech is the public's need for information to facilitate commercial decisions, the Court found that legal and nondeceptive advertising deserves some degree of constitutional protection.[50]

2. Is the Government Interest Substantial?—The second question the *Central Hudson* test addresses is whether the state's interest served by the restriction is substantial.[51] Two related questions have arisen in the Court's determination of this issue — what qualifies as a substantial state interest[52] and what is the standard for determining whether that interest

---

47. 413 U.S. 376 (1973). *See supra* note 17.

48. 421 U.S. 809 (1975). *See supra* note 17.

49. *See Central Hudson*, 447 U.S. at 564 n.6. The Court determined that, unlike political or religious speech, truth of commercial speech is much easier to determine. Bates v. State Bar of Ariz., 433 U.S. 350, 381 (1977).

50. *Central Hudson*, 447 U.S. at 563. "[T]here can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity." *Id. See* Friedman v. Rogers, 440 U.S. 1, 13, 15-16 (1979) (the Court upheld a statute prohibiting the practice of optometry under trade names, because the public might be misled through the deceptive use of the same or similar trade names); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 783 (1978); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978).

51. 447 U.S. at 564, 568-69. The Court found that the state's interests in conserving energy and promoting more cost efficient utilization of resources were substantial. *See also* Virginia State Bd. of Pharmacy v. Virginia Consumer Council, 425 U.S. 748, 766-68 (1976).

This is an important consideration because the latter prongs of the test directly relate to how the state interest is defined. *See infra* notes 58-73 and accompanying text. The third part of the test expressly requires that the restriction "directly" advance the state interest. Justice Rehnquist has characterized these final two steps as determining a reasonable "fit" between the legislature's ends and the means of implementing them. Posadas de P. R. Assocs. v. Tourism Co., 478 U.S. 328 (1986).

Moreover, the state's interests in a particular area change with the circumstances of the communication. *See* Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985) ("The governmental interests sufficient to justify a ban on in-person solicitation of legal business in *Ohralik*, 436 U.S. 447 (1978), are not present here [a newspaper advertisement].").

52. *Compare* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60 (1983) (The state's interest in shielding recipients from mails that they are likely to find offensive is insubstantial; however, the state's interest in aiding parents' control of the manner in which they discuss birth control is substantial. Unsolicited mailings of advertisement for contraceptives could not be banned by the postal regulation which prohibits the mailing of material intended to prevent conception.) *with Posadas*, 478 U.S. 328 (the state's interest in reducing its residents' demand for gambling was substantial; prohibition on local advertising of casinos aimed at residents of Puerto Rico) *and* San Francisco Arts & Athletics v. United States Olympic Comm., 483 U.S. 522 (1987) (governmental interest in protecting the word "Olympic" was substantial; gay olympic games not permitted to use the word in advertising).

is "substantial."[53] The Court has hinted that no governmental interest can be great enough to limit commercially informative speech.[54] These hints, however, have come mostly in cases involving a person's need to make a socially significant decision.[55] In such a situation, the Court indicated that the receipt of truthful information pertaining to that decision would always outweigh the government's interest.[56] Recently, however, the Court has simply accepted the state's proffered interests as legitimate and worthy without requiring much justification or engaging in independent analysis.[57] Thus, it is reasonable to suggest that a relatively insignificant interest could qualify as substantial under the *Central Hudson* test.

3. Does the Limitation Advance the Interest?—The third prong of the test is whether the limitation "directly" advances the state interest.[58] Since *Virginia Pharmacy*, the Court has been unwilling to uphold com-

---

53. *Compare* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 507-08 (1981) (the Court simply accepted as substantial the asserted interests) *with Bolger*, 463 U.S. at 71 n.20 (the Court stated that "[t]he party seeking to uphold a restriction on commercial speech carries the burden of justifying it."). *See also Posadas*, 478 U.S. 328 (the Court, though it talked in terms of the *Central Hudson* test, essentially created a rational nexus test). Comment, *supra* note 37, at 271. Thus, the standard of protection might have dropped from an "intermediate" level scrutiny to a "rational basis" level, where the court *accepts* the proffered interest as substantial.

In other areas of protected speech, the Court is much more strict in its requirements of a factual showing of the state's interest. Schad v. Borough of Mount Ephraim, 452 U.S. 61, 69-70 (1981) ("[T]he Court recognized its obligation to assess the substantiality of the justification offered for a regulation that significantly impinged on freedom of speech."). *See also* Schneider v. State, 308 U.S. 147, 161 (1939) ("Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions.").

54. *Bolger,* 463 U.S. at 75 (citing *Linmark*, 431 U.S. 85 (1977)) (The Court relied on the dual nature of the advertisements when it stated, "the restriction of 'the free flow of truthful information' constitutes a 'basic' constitutional defect regardless of the strength of the government's interest.").

55. *Id.* (parents need truthful information to discuss birth control with their children); *Linmark*, 431 U.S. 85 (the information conveyed was the availability of houses for sale; as the Court termed, one of the most important decisions a person must make).

56. *Bolger*, 463 U.S. at 75.

57. The U.S. Constitution: Analysis and Interpretation, *supra* note 25, at 1087 n.17. *See Metromedia*, 453 U.S. 490; *Posadas*, 478 U.S. 328.

58. *Central Hudson*, 447 U.S. 557, 564-65, 569. The Court found that the state's interest in promoting more cost efficient utilization of resources did not provide a constitutionally adequate reason for restricting commercial speech. The connection was at most tenuous. However, the advertising prohibition directly advanced the state's interest in conserving electricity by not actively promoting it.

This step is similar to, but appears to be more stringent than, the requirement in the time, place, and manner test that the limitation serve a significant governmental interest. *See supra* note 31 and accompanying text.

mercial speech restrictions that only indirectly or remotely advance the state's interest.[59] Yet recently, the word "directly" has been all but written out of the test. The Court seems willing to accept commercial speech restrictions which only reasonably advance the state's interest.[60] Nevertheless, the Court continues to stress that its test is still more strict than the "rational basis" test used for other constitutional provisions.[61]

In *Posadas de Puerto Rico Associates v. Tourism Co.*,[62] the Court found it reasonable for Puerto Rico to ban casino gambling advertising upon the legislature's belief that such advertising increased the amount of casino gambling.[63] The Court required no showing of how a casino advertising ban "directly" advanced a governmental interest. There was no evidence that reduced advertising would reduce casino gambling or the "evils" associated with it, which was the proffered governmental objective.[64] Instead, the Court merely required that there be some commonsense relation between the means employed by the legislature (a ban on advertising) and the end (reduced casino gambling) it sought to achieve.

4. Is the Restriction Too Extensive?—The final prong of the *Central Hudson* test is whether the restriction is more extensive than "necessary."[65] As originally advanced, this question was a reformulation of the "least restrictive means" test enunciated in *Shelton v. Tucker*.[66] However, as

---

59. In *Virginia Pharmacy*, the state's interest in promoting professionalism and quality were found not directly advanced by the statute prohibiting advertising of price information. 425 U.S. at 766-70. *See also Bates*, 433 U.S. 350 (1977) (advertising by lawyers). The connection between advertising and professionalism is too attenuated.

Further, in *Bolger*, 463 U.S. 60, the Court found that a prohibition on mailing advertisements concerning contraceptives only provided limited incremental support for the state's interest in letting parents choose when to discuss birth control with their children. "Under these circumstances, a ban on unsolicited advertisements serves only to assist those parents who desire to keep their children from confronting such mailings, who are otherwise unable to do so." *Id.* at 73.

60. *See Posadas*, 478 U.S. at 342; *Metromedia*, 453 U.S. at 509, 511.

61. Board of Trustees, S.U.N.Y. v. Fox, 109 S. Ct. 3028, 3035 (1989). "[T]he modified test] is far different, of course, from the 'rational basis' test used for Fourteenth Amendment equal protection analysis." *Id.*

62. 478 U.S. 328 (1986). *Puerto Rico*'s interest was to reduce the harms associated with casino gambling by its citizens. To further that goal, Puerto Rico sought a ban on all promotional advertisements of casinos, but not other forms of gambling, aimed at Puerto Rican residents.

63. *Id.* at 342.

64. *See* Comment, *supra* note 37, at 272 n.198 (a strong criticism of the majority's decision).

65. 447 U.S. 557, 566, 569-71. The Court found that the ban on all promotional advertising was more extensive than necessary because the prohibition covered all advertisements without regard for the impact on overall energy consumption.

66. 364 U.S. 479, 488 (1960). In *Shelton*, the Court invalidated a statute requiring teachers to disclose all organizations with which they belonged because it was overbroad

with the third prong, recently the Court has been deferential to legislative decisions.[67] In fact, in its most recent decision regarding commercial speech, *Board of Trustees, S.U.N.Y. v. Fox*,[68] the Court essentially replaced the "necessary" standard with a "reasonable" standard.[69] A state need no longer use the least restrictive means in regulating commercial speech; rather, a restriction need only be narrowly tailored or no more extensive than "reasonable."[70]

In *S.U.N.Y.*, the Court held that something short of a least-restrictive-means standard is applied to commercial speech restrictions.[71] The Court stated that the common sense distinction between commercial speech and noncommercial speech would be illusory if the *Central Hudson* test required commercial speech restrictions to be the least restrictive when the time, place and manner restrictions must only be reasonable.[72] In eliminating the "necessary" standard, the Court seems willing to give more deference to a legislature's determination of what means are most appropriate.[73] Therefore, if a state reasonably determines that a particular restriction advances a significant governmental interest, and if it appears that the means employed are reasonably non-intrusive, the Court will not invalidate the restriction.

---

and had no rational relationship to the state interest. *See also Virginia Pharmacy*, 425 U.S. 748; *Linmark Assocs.*, 431 U.S. 85 (there were less intrusive means to stem the problem of "white flight" than by banning "for sale" signs, one of them being education); *Bolger*, 463 U.S. at 73 (the Court stated that prohibiting the mailing of advertisements concerning contraceptives did not directly advance the state's interest in the most narrow way. "[The] *means* of effectuating this interest [helping parents teach children about birth control], however, fails to withstand scrutiny." (emphasis in original)).

67. *See San Francisco Arts & Athletics,* 483 U.S. 522. The Court appears to be leaving the determination of whether the restriction is too extensive up to the legislature. "The restrictions [on the use of the word "Olympic"] are not broader than Congress reasonably could have determined to be necessary to further these interests." *Id.* at 539.

68. 109 S. Ct. 3028 (1989).

69. *Id.* at 3035.

70. *Id.*

71. *Id.* The Court now requires that the restriction be "narrowly tailored." *See supra* note 30 and discussion of noncommercial speech. Under the time, place and manner test, the Court only requires that the restriction be narrowly tailored to serve the government's significant interest. Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984); City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984). *But see* Schad v. Borough of Mount Ephraim, 452 U.S. 61, 70 (1981) (the Court stated that it "must not only assess the substantiality of the governmental interests asserted but also determine whether those interests could be served by means that would be less intrusive. . . .").

72. *S.U.N.Y.*, 109 S. Ct. at 3033.

73. *Id.* The Court even discussed the looseness in meaning of the word "necessary" particularly in terms of the necessary and proper clause.

C. *Summary*

In the less than fifteen years following *Virginia Pharmacy*, the Court's failure to delineate the extent of permissible restriction has weakened the first amendment protection enjoyed by purely commercial speech. The *Central Hudson* test[74] is essentially a balancing test between the state's interest and the magnitude of the restriction on the speech.[75] As the Court has most recently applied it, the test requires that the commercial speech be truthful and not misleading.[76] Second, the state interest must be substantial, although the Court no longer requires the state to demonstrate the same degree of substantiality as it did before.[77] Instead of requiring the regulation to "directly" advance the state's interests, the Court only requires that there be a "reasonable fit" between the state's interests and the means of advancing those interests.[78] Finally, the Court has replaced the "least restrictive means" test with a requirement that the regulation merely be "narrowly tailored."[79]

II. Analysis of State Statutes

Fearing a rapid rise in the number of unsolicited facsimile advertisements, several states have turned to legislation in an attempt to solve the perceived problem. During the 1989 legislative sessions, twenty-two states and Congress enacted or proposed legislation concerning restrictions on "junk" faxes.[80] In general, four types of restrictions have surfaced: (1)

---

74. The *Central Hudson* test was designed to afford "intermediate" constitutional protection to commercial speech. *See supra* note 37.

75. San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522 (1987). *See also* Bolger v. Young Drug Products Corp., 463 U.S. 60, 80 (1983) (Stevens, J., concurring) (the Court invalidated the restriction because the intrusion on the recipient's rights was relatively small and the restriction imposed on the advertiser was relatively large).

This balancing test is also what Justice Rehnquist described when he spoke of the "reasonable fit" between the legislature's ends and the means of attaining them. Posades de Puerto Rico Ass'n v. Tourism Co., 478 U.S. 328, 341 (1986). Because of this balancing aspect, the Court has noted the similarity between the *Central Hudson* test and the time, place, and manner test. *San Francisco Arts & Athletics*, 483 U.S. at 537 n.16. *See also* Note, *supra* note 24, at 138.

76. *See supra* notes 46-50.

77. *See supra* notes 51-57. The Court is willing to accept the legislature's determinations as legitimate and substantial. *But see* Board of Trustees, S.U.N.Y. v. Fox, 109 S. Ct. 3038, 3035 (1989) ("[T]he state bears the burden of justifying its restrictions, it must affirmatively establish the reasonable fit we require." (citation omitted)).

78. *See supra* notes 58-64.

79. *See supra* notes 65-73.

80. States which have enacted legislation: Connecticut, 1989 Conn. Acts 89-103 (Reg. Sess.); Florida, Fla. Stat. Ann. § 365.1655 (West Supp. 1989); Illinois, 1989 Ill.

a complete ban on all unsolicited facsimile advertisements; (2) a system whereby the sender must seek prior approval from the recipient before transmission; (3) a "national clearinghouse" of fax numbers whose owners have expressed a desire not to receive unsolicited advertisements; and (4) restrictions on the number of pages and hours of operation of the advertiser. This Note will analyze these restrictions to determine their validity, utilizing the modified *Central Hudson* balancing test discussed above.[81]

A. Statutes Completely Banning All Unsolicited Facsimile Advertisements

By far the most popular[82] type of restriction is a complete ban on all unsolicited facsimile advertisements. Under this type of restriction, the state makes it illegal to transmit an unsolicited facsimile proposing a commercial transaction. The following Florida legislation illustrates the common wording of the "complete ban" statutes: "It is unlawful for any person to use a machine that electronically transmits facsimiles of documents through connection with a telephone network to transmit within this state *unsolicited advertising material for the sale of any real property, goods, or services.*"[83] These statutes completely prohibit one method of

---

Legis. Serv. P.A. 86-555 (West); Maryland, MD. COM. LAW CODE ANN. § 14-1313 (Supp. 1989); New York, N.Y GEN BUS. LAW § 396-aa (McKinney Supp. 1990); Oregon, 1989 Or. Laws Adv. Sh. No. 621.; Rhode Island, R.I. GEN. LAWS § 11-35-27 (Supp. 1989); Texas, TEX. BUS. & COM. CODE ANN. § 35.47(a) (Vernon Supp. 1990).

States which have proposed legislation currently in committee: Alaska, Massachusetts, Michigan, New Jersey, New Mexico, North Carolina, Ohio, Pennsylvania, South Carolina, Vermont, Washington, Wisconsin.

One state has had legislation die in Committee: Louisiana.

One state has had legislation vetoed: California.

States which will propose legislation when the next legislative session commences: Kentucky, Utah.

81. *See supra* note 40 and accompanying text. It will be assumed for purposes of this Note and the following analysis that the facsimile advertisements in question are truthful and not misleading, thereby satisfying the first part of the *Central Hudson* test.

82. Thirteen states have enacted or proposed this type of regulation: Connecticut, 1989 Conn. Acts 89-103 (Reg. Sess.); Florida, FLA. STAT. ANN. § 365.1657 (West Supp. 1989); Maryland, MD. COM. LAW CODE ANN. § 14-1313 (1989); Rhode Island, R.I. GEN. LAWS § 11-35-27 (Supp. 1989); Alaska, H.B. 232, 1989 Ala. Sess.; Iowa, H.B. 2112, 1990 Iowa Sess.; Louisiana, S.B. 84, 1989 La. Sess.; Massachusetts, S.B. 2007, 1989 Mass. Sess.; Michigan, H.B. 4447, 1989 Mich. Sess.; New Jersey, A.B. 4401, 1989 N.J. Sess.; North Carolina, H.B. 455, 1989 N.C. Sess.; Pennsylvania, S.B. 1025, 1989 Penn. Sess.; Vermont, S.B. 132, 1989 Vt. Sess.

83. FLA. STAT. ANN. § 365.1655 (West Supp. 1989) (emphasis supplied). It should be noted that the Florida statute is somewhat unique in that it expressly limits its scope to intrastate transmissions. Most of the other states have not expressed this limitation on the face of the regulation; however it is probably understood that these statutes only

communicating advertisements, while appearing to only prohibit fax transmissions which propose a sale of real property, goods, or services.[84] Thus, although the statutes apparently prohibit a transmission advertising the sale of fax paper or the transmission of an ad announcing a new repair service for facsimile machines, they do not appear to prohibit a press release facsimile, for example, on behalf of a political candidate announcing a press conference or seeking a contribution.

Historically, the Court has rarely discussed the issue of a total ban on a medium of communication, only recently recognizing a "total ban" as a different form of first amendment analysis.[85] The few previous decisions on total speech prohibitions, however, have created a presumption of invalidity for statutes which completely ban a method of communication.[86]

In the early cases, the Court discussed the issue of a total prohibition primarily in the context of handbill distribution and door-to-door solic-

---

apply to intrastate transmissions.

One drawback with this limitation, however, is that an out-of-state advertiser is still able to fax unsolicited ads without penalty. Absent a federal regulation, it seems that this restriction only hurts the in-state advertisers and does not benefit the fax machine owners to any great degree.

One problem common to all "junk" fax statutes is the definition of advertising material promoting a sale. The statutes are necessarily broad in their definitions; however, they might prohibit some transmissions that people might want to receive. For example, does unsolicited advertising material include a thank-you letter faxed after an initial meeting in which the sale of goods was discussed? Clearly, the salesperson is faxing the letter in the hopes that the client will follow through on the negotiations, which is an unsolicited facsimile promoting the sale of a good. This is probably not a problem for the New York statute (*see infra* note 158 and accompanying text) and others exempting pre-existing business relationships, because there is a prior business relationship which sparked the thank-you note. Absent such a relationship, however, what constitutes advertising material is an unanswered question.

84. *See also* 1989 Conn. Acts 89-103 (Reg. Sess.) ("No person shall use a machine that electronically transmits facsimiles through connection with a telephone network to transmit unsolicited advertising material which offers to sell goods or services."); MD. COM. LAW CODE ANN. § 14-1313 (Supp. 1989) ("Commercial solicitation means the unsolicited electronic or telephonic transmission in the state to a facsimile device to encourage a person to purchase goods, realty, or services."); R.I. GEN. LAWS § 11-35-27 (1989) ("Any person who uses a machine that electronically transmits facsimiles of documents . . . to transmit unsolicited advertising material for the sale of any real property, goods or services shall be guilty. . . .").

85. Comment, *Metromedia, Inc. v. City of San Diego*, 11 HOFSTRA L. REV. 371, 386 (1982). In fact, the Court, for the first time, in Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981), recognized the term "total ban" as a specific form of analysis in free speech litigation. *Id.*

86. *See* Schad v. Borough of Mount Ephraim, 452 U.S. 61, 80 (1981) (Stevens, J., concurring) ("[I]f one starts, as the Court does, from the premise that 'appellants' claims are rooted in the First Amendment, . . . it would seem reasonable to require the Borough to overcome a presumption of invalidity.").

itation.[87] In both situations, the Court invalidated state regulations prohibiting the protected conduct.[88] The similarity between the statutes prohibiting the distribution of handbills and the statutes regulating facsimile advertising is marked. In *Schneider v. Irvington*,[89] a Los Angeles municipal ordinance stated: "No person shall distribute any handbill to or among pedestrians along or upon any street . . . ."[90] The Court had little difficulty in invalidating the ordinance as an abridgement of first amendment freedoms.[91] Moreover, in *Jamison v. Texas*,[92] the restriction in question stated: "It shall be unlawful for any person . . . to scatter any handbills of any description . . . or any advertising device . . . in the city of Dallas."[93] The Court held that a complete prohibition on the distribution of handbills was unconstitutional, but hinted that more reasonable time, place, and manner restrictions might be valid.[94]

In dicta, the Court discussed this restriction in terms of commercial speech. The Court would have allowed a complete prohibition on purely commercial leaflets,[95] citing *Valentine*,[96] which held that commercial speech was not protected by the first amendment.[97] Today, however, a similar result would surely be questioned and might not stand after *Virginia Pharmacy* and its progeny.[98]

Recently, the Court discussed the issue of a complete ban in the context of live entertainment, another form of protected speech.[99] In *Schad*

---

87. *See, e.g.,* Jamison v. Texas, 318 U.S. 413 (1943) (prohibition on the distribution of handbills in the city was unconstitutional); Martin v. City of Struthers, 319 U.S. 141 (1943) (prohibition on the door-to-door distribution of handbills summoning occupants to their door was unconstitutional).

88. *See Jamison*, 318 U.S. 413; *Martin*, 319 U.S. 141.

89. 308 U.S. 147 (1939).

90. *Id.* at 154; *cf.* 1989 Conn. Acts 89-103 (Reg. Sess). *See supra* note 84.

91. 308 U.S. 147, 162.

92. 318 U.S. 413 (1943).

93. *Id.* at 415 n.2.

94. *Id.* at 416. The Court stated, "[t]he right to distribute handbills concerning religious subjects on the streets may not be prohibited at all times, at all places, and under all circumstances." *Id.*

95. *Id.* at 417. *See also* Breard v. City of Alexandria, 341 U.S. 622 (1951), where a prohibition on commercial door to door solicitations was upheld.

96. 316 U.S. 52. *See supra* note 17.

97. Valentine v. Chrestensen, 316 U.S. 52, 55 (1942).

98. *Linmark,* 431 U.S. at 94 ("That the proscription applies only to one mode of communication [for sale signs], therefore, does not transform this into a 'time, place, or manner' [the test for commercial speech regulations at the time] case.").

99. Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981). Although live entertainment and facsimile advertisements are not directly analogous, they both deal with one method of communication.

See also Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 515 n.20 (1981) (prohibition of off-site billboard advertising; although the plurality claimed a total ban

v Borough of Mount Ephraim,[100] the borough sought to prohibit all live entertainment through a zoning ordinance.[101] Owners of an adult bookstore seeking to install "peep shows" featuring live nude dancing challenged the ordinance as an unconstitutional infringement on their first amendment rights.[102] Using a time, place, and manner test to invalidate the ordinance, the Court required a showing, on the face of the ordinance, of a sufficient state justification for such a broad restriction on protected expression.[103] Moreover, the Court required that the restriction be narrowly drawn and that it further a substantial governmental interest.[104] Justice Brennan has used *Schad* to suggest that a complete ban on first amendment speech is a wholly different analysis than the commercial/noncommercial speech analysis.[105] Thus, Justice Brennan's new analysis requires that the prohibition be invalidated unless it satisfies the reasonable time, place, or manner test, which requires that the restriction be content-neutral, narrowly drawn, serve a significant governmental interest, and leave open alternative channels of communication.[106]

The relative popularity of the complete ban statutes may be explained by the ease of drafting and implementing them: every unsolicited facsimile transmission proposing a commercial transaction is illegal.[107] If an advertiser

---

was not before the Court, the other Justices believed that the issue was before them); *In re* R.M.J., 455 U.S. 191 (1982) (prohibition on advertising by an attorney violates his first amendment rights).

100. 452 U.S. 61 (1981).

101. The ordinance section 99-15B established permitted uses in the commercial zone where the bookstore was located. The lower courts construed this ordinance to prohibit all live entertainment. *Id.* at 64.

102. It should be noted that "live nude dancing is protected by the First Amendment." *Id.*

103. *Id.* at 67.

104. *Id.* at 68. "The onus of demonstrating that no less intrusive means will adequately protect the compelling state interest and that the challenged statute is sufficiently narrowly drawn is on the party seeking to justify the burden." *Id.* at 69 n.7 (quoting Village of Belle Terre v Boraas, 416 U.S. 1 (1974)).

105. *Metromedia*, 453 U.S. 490, 526-27 (Brennan, J., concurring). "Different factors come into play when the challenged legislation is simply a time, place, or manner regulation rather than a total ban of a particular medium of expression." *Id.* at 527 n.6. *See also* Comment, *supra* note 85, at 386 ("The distinction between commercial and noncommercial speech, with their separate standards, evaporates, and the overall practical effect of the ordinance becomes the focus of the analysis.").

106. *See supra* notes 29-32. It is important to note that the distinction between commercial and noncommercial speech is of no importance when a complete prohibition is discussed. *See Metromedia*, 453 U.S. 490, 526 (Brennan, J., concurring).

107. There are also a handful of states that exempt transmissions between people with a prior business relationship. *See, e.g.,* MD. COM. LAW CODE ANN. § 14-1313 (1989). For most of the complete ban statutes, intent is not required; however, a few states have incorporated such statutes in their harassment codes. *See* CONN. GEN. STAT. § 53A-187 (1989).

faxes an unsolicited advertisement, he has violated the law.[108] Another advantage of the statutes is the clarity with which they advance the state's interest in reducing the number of unsolicited advertisements, because no one will be able to conduct unsolicited advertising via fax machine. As a result, the number of unsolicited and unwanted transmissions will necessarily diminish, and fax machine owners will not be disturbed by unwanted transmissions.

Like the ordinances in *Jamison*[109] and *Schad*,[110] however, restrictions banning unsolicited facsimile advertisements have constitutional infirmities. These total prohibitions violate Justice Brennan's reasonable time, place, and manner test used to analyze "complete bans."[111] They are not content neutral because they specify that only facsimiles proposing commercial transactions are illegal. They are not narrowly drawn because they prohibit all fax advertisements whether or not they might be welcomed by the recipient. Moreover, the extent to which they serve a significant governmental interest is questionable. The cost savings to the consumer for banning these ads may be minimal if other types of unsolicited facsimiles are not prohibited by these statutes.

By prohibiting fax advertisements, the statutes do leave open other channels of communication for the advertisers. As a result, states might attempt to justify their commercial fax bans on this ground. The Court, however, has not held the availability of alternate channels to be a valid justification for such a broad prohibition of a medium of communication.[112] In *Bolger v. Youngs Drug Products Corp.*,[113] the Court invalidated a statute prohibiting the mailing of certain offensive advertisements, even though the post office argued that other means of communication were available.[114] The Court stated, "A prohibition on the use of the mails is a significant restriction on First Amendment rights. . . . [T]he use of the mails is almost as much a part of free speech as the right to use our

---

108. The typical penalty is a fine. *See, e.g.*, MD. COM. LAW CODE ANN. § 14-1313 (1989). Several states, however, have made violations of these statutes misdemeanors. *See, e.g.*, R.I. GEN. LAWS § 11-35-27 (1989).

109. 318 U.S. 413 (1943).

110. 452 U.S. 61 (1981).

111. *See supra* notes 103-04 and accompanying text.

112. *See, e.g., Bolger*, 463 U.S. 60, 76 (1983) (Rehnquist, J., concurring); Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981) (Blackmun, J., concurring). "One is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Id.* at 78 (quoting Schneider v. State, 308 U.S. 147, 163 (1939)); *Linmark Assocs.*, 431 U.S. 85 (1977) (ordinance could not be sustained on the ground that it restricts only one method of communication while leaving ample alternatives open).

113. 463 U.S. 60 (1983).

114. *Id.* at 79 (Rehnquist, J., concurring).

tongues."[115] Like the mails, the use of the fax machine is fast becoming an essential method of business communication. Thus, any prohibition on the use of fax machines to communicate is a significant restriction on the first amendment.

Furthermore, the "complete ban" statutes fail the *Central Hudson* test for commercial speech restrictions. Applying the *Central Hudson* test, the state has made a legislative determination that these advertisements wrongfully interfere with the use of another's machine. Although the state has a substantial interest in protecting its citizens' business investments and property interests,[116] to cite this interest as a ground for a complete ban on a form of commercial speech is burning down the house to roast the pig: the ban applies *whether the recipient wants to receive fax advertisements or not.*[117] Such a determination is paternalistic[118] and, as with *Jamison* and *Schad*, probably would not withstand the Court's scrutiny. Further, the *Central Hudson* test requires a reasonable fit between the legislature's ends and the means of implementing them.[119] The totality of the prohibition and the fact that it applies whether or not the fax owner wishes to receive advertisements is not reasonable. As noted above, other total prohibitions on methods of communication have been invalidated because they were overbroad in prohibiting the receipt of information some people may want and have a right to receive.

Under statutes completely banning unsolicited facsimile advertisements, advertisers are precluded from using one method of communication, the fax machine.[120] Such a result violates an advertiser's first amendment right to communicate. In addition, the state is interfering with an individual's choice by not giving a willing recipient an opportunity to receive these transmissions. The Court has criticized this type of state paternalism as

---

115. *Id.* at 80 (Rehnquist, J., concurring) (citing Blount v. Rizzi, 400 U.S. 410, 416).

116. Memorandum from J. Joseph Curran, Jr., Attorney General of Maryland, to The Honorable William Donald Schaefer, Governor of Maryland 2 (Apr. 24, 1989) (discussing the constitutionality of H.B. 1319 (Maryland's Junk-fax law)) ("The State seeks to protect the investments of persons who have purchased facsimile machines and wish to restrict reception in order to keep the machines open for transmissions they desire.").

117. It has been pointed out that there might be certain unsolicited advertisements people may want. *See* Ellis, *supra* note 5, at 20 (hypotheticals describing the definitional problems associated specifically with the Congressional legislation, but applicable to all unsolicited facsimile advertising statutes).

118. *See, e.g., Linmark Assocs.*, 431 U.S. at 97; Virginia Pharmacy, 425 U.S. at 770.

119. *See Posadas*, 478 U.S. at 340.

120. Courts have not favored total prohibitions on a method of communication because they infringe on a person's ability to convey information. *Linmark Assocs.*, 431 U.S. 85.

an invalid use of state authority.[121] In sum, if there is a problem with unsolicited fax advertising,[122] a total prohibition is too broad a means to protect the rights of both advertisers and fax machine owners.

B. Restrictions Requiring the Advertiser to Seek Prior Approval

A second type of restrictions, requiring an advertiser to seek approval before sending a fax advertisement, is also popular with a number of state legislatures.[123] Under this type of restriction, the advertiser must receive the recipient's express permission before sending a facsimile advertisement. Illustrative of this is the Texas legislation:

> A person may not make or cause to be made a transmission for the purpose of a solicitation or sale to a facsimile recording device . . . *unless the person or entity receiving the transmission has given, prior to the transmission, consent to make or cause to be made the transmission.*[124]

The Court has rejected a governmental restriction requiring a potential recipient to give his prior approval before being sent a communication.[125] In *Lamont v. Postmaster General*,[126] the Court invalidated a postal regulation requiring the Post Office to advise the addressee that his mail

---

121. *See supra* note 116 and accompanying text.

122. California Governor Deukmejian, in his veto message, wanted to wait until there was documented proof from the Public Utilities Commission that a problem with unsolicited advertisements existed.

123. Six states have enacted or proposed this type of regulation: Texas, TEX. BUS. & COM. CODE ANN. § 35.47 (Vernon 1989); Illinois, 1989 Ill. Legis. Serv. 86-555 (West); New Jersey, A.B. 4401, 1989 N.J. Sess. Law Serv. *as amended*; Ohio, H.B. 457, 118th Gen. Ass., 1989 Ohio Sess.; Washington, H.B. 1513, 51st Leg., 1989 Wash. Sess.; Wisconsin, A.B. 323, 1989 Wis. Sess.. One state has vetoed this type of legislation. California, S.B. 487, 1989 Cal. Sess.

124. TEX. BUS. & COM. CODE ANN. § 35.47 (Vernon 1989) (emphasis added). Illinois' statute states:

> No person shall knowingly use a facsimile machine to send to another person a facsimile of a document containing unsolicited advertising or fund-raising material, except to a person which the sender knows or under all of the circumstances reasonably believes has given the sender permission, for the sending of such material.

1989 Ill. Legis. Serv. 86-555 (West).

As with the other statutes, these regulations fail to mention other forms of unsolicited facsimile transmissions which cause the same amount of nuisance to the machine owner. *See supra* note 84.

125. *See* Lamont v. Postmaster General, 381 U.S. 301 (1965). The issue in *Lamont* was whether a postal patron could be required to request his mail before it would be sent to him.

126. *Id.*

would be destroyed unless a reply card was returned.[127] The Court reasoned that requiring a recipient to act violated his unfettered right to the exercise of free speech.[128] The Court discussed the "chilling" effect that prior restraints have on speech.[129] To protect the recipient's rights, no request of approval can be required.[130]

Justice Rehnquist[131] discussed a "prior approval" argument in his concurring opinion in *Bolger v. Youngs Drug Product Corp.*[132] The discussion arose in response to the post office's argument that Youngs Drug could have premailed a questionnaire, describing its proposed controversial[133] advertisement and asking whether the household would like to receive the ad.[134] Justice Rehnquist responded that this prior approval procedure was too great a burden on protected speech.[135] He stated: "First Amendment freedoms would be of little value if speakers had to obtain permission of their audiences before advancing particular viewpoints."[136] Although the majority did not specifically reach the "prior approval" issue, it held that the postal regulation did not advance the state's interests and was too burdensome a restriction on speech.[137] In sum, the Court has invalidated statutes requiring a participant, either an advertiser[138] or an addressee,[139] to ask before exercising his first amendment rights.

---

127. *Id.* at 303.

128. *Id.* at 305.

129. *Id.* at 307 (The Court held that being forced to act before the mail is sent "is almost certain to have a deterrent effect.").

130. In support of its holding, the Court cited several cases invalidating restrictions on the speakers' rights to communicate their ideas. *Id.* at 306. *See* Thomas v. Collins, 323 U.S. 516 (1945) (a registration requirement on speeches by labor organizers was invalidated); Murdock v. Pennsylvania, 319 U.S. 105 (1943) (a flat license tax on the exercise of first amendment rights was struck down); Lovell v. City of Griffin, 303 U.S. 444 (1938) (a licensing system to distribute literature was declared unconstitutional).

131. Justice Rehnquist has always been in favor of limiting the constitutional protection granted to commercial speech. *See* Shapero v. Kentucky Bar Ass'n, 108 S. Ct. 1916 (1988) (Rehnquist, J., dissenting) (blanket prohibition of targeted direct mail solicitation by lawyers held inconsistent with the first amendment); Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985) (Rehnquist, J., concurring in part and dissenting in part) (expressed the view that it is proper to prohibit attorneys from using unsolicited legal advice to obtain clients); *Virginia Pharmacy*, 425 U.S. 748 (1976) (Rehnquist, J., dissenting); *Bigelow*, 421 U.S. 809 (1975) (Rehnquist, J., dissenting) (the advertisement in question was a commercial proposition and thus entitled to little constitutional protection); *Central Hudson*, 447 U.S. 557 (1980) (Rehnquist, J., dissenting).

132. 463 U.S. 60 (1983) (Rehnquist, J., concurring).

133. The majority ruled that the advertisement could be considered offensive to some people, but that was never a reason to deny protection to any form of speech. *Id.* at 71.

134. *Id.* at 80.

135. *Id.*

136. *Id.* (citing Lamont v. Postmaster General, 381 U.S. 301 (1965)).

137. *Bolger,* 463 U.S. at 80.

138. *See id.*

139. *See Lamont,* 381 U.S. 301.

As with the total prohibition on fax advertisements, the state's interest in requiring prior approval is to protect its citizens' investments by curtailing the number of unsolicited advertisements. As a result, the legislature has determined that the burden of obtaining the recipient's prior approval is a legitimate cost of sending an unsolicited fax, which should be borne by the sender, not the recipient. One advantage of these statutes, unlike the total prohibitions, is that the state has left the decision of whether to allow unsolicited advertising transmissions to the people affected, the individual machine owners. Although this procedure looks workable, commentators have criticized it as impractical.[140]

In a letter to California Governor Deukmejian urging him to veto anti-junk fax legislation, Professor Daniel Brenner, former senior legal advisor to the Chairman of the FCC, has argued that these prior-approval statutes present an "enforcement nightmare."[141] The states would be required to monitor and regulate 30 billion pages of facsimiles transmitted per year.[142] Additionally, the public would have to cope with the additional intrusiveness of "millions of unnecessary phone calls a year"[143] inquiring about approval. These enforcement costs mitigate any benefit an individual fax machine owner receives, particularly in view of alternative restrictions.[144]

The statutes mandating prior approval suffer from the same procedural infirmities as the regulation in *Lamont* and the Post Office's argument in *Bolger*. Applying the final two prongs of the *Central Hudson* test, the prior approval statutes advance the state's interest in protecting its citizens' investments, but they are not narrowly tailored in relation to the ends sought to be achieved. The requirement that an advertiser seek approval before he may act is too restrictive a policy. The Court, based on *Lamont*

---

139. *See Lamont,* 381 U.S. 301.

140. Letter from Prof. Daniel Brenner to the Honorable George Deukmejian (Sept. 5, 1989) (urging veto of California's anti-fax advertising legislation).

141. *Id.*

142. Statement of Congressman Christopher Shays on the Facsimile Advertising Regulation Act of 1989: Before the House Subcommittee on Telecommunications and Finance (May 24, 1989). He states that the estimated number of pages faxed annually has skyrocketed from 12 billion to 30 billion. It is also estimated that by 1991, the number of machines will double and the pages faxed will reach 58 billion.

143. *See also* Cox, *The Market Will Deal with Fax Attacks*, USA Today, Feb. 8, 1989, at 8A. These statutes might have the effect of banning advertising by fax because of prohibitive costs. It costs as much to seek approval as it does to send the ad in the first place. Says Direct Marketing consultant Fernando Balazs, "ban on unsolicited faxes raises an interesting prospect in which authorization would be required before sending anything. Of course, requests for authorization would cost just as much as an advertisement itself and severely hinder many other aspects of normal business."

144. *See infra* notes 145-48 and accompanying text (discussion of Congressman Markey's bill creating a clearinghouse of restricted numbers) and notes 158-62 and accompanying text (discussion of the New York statute regulating pages and hours).

and *Bolger*, will take a hard look at statutes requiring prior approval and will probably find that the practical balance should weigh against the state and in favor of the protected speech.

C. Statutes Establishing a Restricted Users List

A third general type of restriction was proposed by Congressman Richard Markey in *The Telephone Advertising Regulation Act*[145] and copied in a modified form in Oregon's anti junk-fax legislation.[146] Both the Markey proposal and the Oregon statute require the recipient to act in restricting the receipt of unwanted facsimile advertising. Markey's proposed bill would establish a restricted users list and then make it unlawful to contact anyone on that list.[147] Oregon's statute is slightly different because the recipient sends a cancelation notice directly to the advertiser.[148] Under both statutes, however, an advertiser may fax his advertisements until requested to stop. Once notice is received, the facsimile advertiser must comply with the desires of the recipient and cease further transmission.

The Court examined the validity of an analogous postal regulation concerning the receipt of unsolicited mail advertisements in *Rowen v. Post Office Department*.[149] The postal regulation allowed a person to ask that his name be removed from a mailer's lists and that all mailings to him from that sender cease.[150] Direct mail advertisers challenged the regulation as an abridgement of their first amendment rights, but the Court upheld

---

145. H.R. 2921, 101st Cong., 1st Sess. (1989). The proposed bill was passed out of the subcommittee, but it has never been voted upon in the committee.

146. 1989 Or. Laws Adv. Sh. No. 621.

147. H.R. 2921 § 2(b)(1) states:

> It shall be unlawful for any person within the United States by means of a telephone to use any telephone facsimile machine or other electronic device to send any unsolicited advertisement to the telephone facsimile machine of any person whose number is listed . . . as the telephone number of a person who objects to receiving unsolicited advertisements by telephone facsimile machine.

148. 1989 Or. Laws Adv. Sh. No. 621 states:

> If a person receives on a facsimile machine any unsolicited and unwanted advertising material for the sale of any realty, goods or services, the person may give the sender of such material written notice to discontinue further such transmissions. No person who has received such a discontinuance notice shall use a facsimile machine to transmit unsolicited advertising material for the sale of realty, goods or services to the person who gave the discontinuance notice for a period of one calendar year. . . .

149. 397 U.S. 728 (1969). The challenged regulation was title III of the Postal Revenue and Federal Salary Act of 1967, 39 U.S.C. § 4009 (1964), *amended by* 39 U.S.C. § 3008 (1982). Under this regulation, a person may require that a mailer remove his name from its mailing lists and stop all future mailings to the household. *Rowen*, 397 U.S. at 729.

150. *Rowen*, 397 U.S. at 729-30.

the regulation as an exercise of the individual's right to privacy.[151] The Court emphasized the unlimited power of the householder to prohibit *any* mailing he considered to be offensive.[152] This "unfettered discretion," however, can only be utilized by the householder, who must act to implement his decision.[153]

Under Markey's proposal, the fax machine owner has the same discretion to determine whether to receive unsolicited facsimile advertisements as the householder in *Rowen*.[154] In both situations, the recipient makes an individual choice about receiving the advertising. Unlike the prior approval statutes, however, it is the fax machine owner who must act to terminate a relationship. In other words, the clearinghouse system requires an act to *exclude* oneself from receiving advertising, and the advertising will continue if no one acts. In the prior approval statutes, the advertising cannot begin until the recipient approves.

In addition, the "clearinghouse" statutes satisfy the final two prongs of the *Central Hudson* test. By allowing the recipient to make the decision, the restrictions advance the state's interest in freeing its citizens from unwanted interference with their investment. The simple act of placing one's name in the directory eliminates virtually all unwanted commercial transmissions.[155] Such restrictions also satisfy the final prong of the test, because they are narrowly tailored.[156] Even the balancing test used in the time, place, and manner restrictions is satisfied. The balance between the degree of intrusion on protected speech and the substantiality of the state's interest is appropriate. The advertiser can still transmit until told to stop

---

151. *Id.* at 734. Receiving the offensive mail at one's home was particularly important in the Court's determination. *Id.* at 737-38. "The ancient concept that a 'man's home is his castle' has lost none of its vitality." Further, the Court said "that we are often captives outside the sanctuary of the home . . . does not mean we must be captives everywhere. The asserted right of a mailer . . . stops at the outer boundary of every person's domain." *Id.* at 738.

"The right of every person 'to be let alone' must be placed in the scales with the right of others to communicate." *Id.* at 736. The legislative history of the bill shows that Congress intended to protect the privacy of homes from such material [offensive advertisements]." *Id.* at 732.

152. *Id.* at 737.

153. *Id.* at 729, 735. Contrast this result with *Lamont,* 381 U.S. 301, *supra* notes 125-29 and accompanying text, where the recipient had to act to receive the mail. Here, the recipient must act in order not to receive the mail.

154. H.R. 2921, 101st Cong., 1st Sess. § (c)(2).

155. The difficulty of updating the lists and ensuring that the advertisers use the lists cannot eliminate all unsolicited faxes.

156. No more speech than "is necessary" is restricted. In fact, they satisfy the old least-restrictive-means test because the regulations allow the advertiser to transmit advertisements until notified to stop.

and the state gives the individual the means to protect his own investment.[157]

Although the clearinghouse system satisfies the *Central Hudson* test and adequately balances the competing interests of advertisers and machine owners, it has some flaws. If an individual does not have his name listed in a directory, an advertiser may transmit as many advertisements as he wants, whenever he wants to send them—there are no limits on pages or hours of transmission. Conceivably, a fax machine owner whose name is not listed in the directory, could have his machine tied up during business hours and not receive any benefit from the restriction. Because the clearinghouse system is all or nothing, his only alternative would be to join the directory and foreclose *all* advertisements, even those he might want to receive.

D. Statutes Imposing Restrictions On Pages and Hours

The final general type of statute takes the restricted user concept one step further. It allows the individual to take his name off a fax list, and it also prohibits the sending of completely unsolicited advertisements during regular business hours. However, limited unsolicited advertisements are allowed during non-business hours. For example, the New York statute provides for a total ban on unsolicited advertisements *except*:

> This section shall not apply to [faxes] sent to a recipient with whom the initiator has had a prior contractual or business relationship nor shall it apply to transmissions not exceeding five pages received between the hours of 9:00 p.m. and 6:00 a.m. Notwithstanding, it shall be unlawful to [fax] to a recipient who has previously sent a message . . . indicating that [he] does not want to receive messages from the initiator.[158]

The result under this type of statute is that the advertiser can still advertise until requested to stop,[159] but is restricted in the times and number of pages he can send. The unsolicited fax advertiser may not advertise during normal business hours nor may he transmit more than five pages.[160]

---

157. As an aside, the national clearinghouse system created by the Congressional bill is similar to the present system implemented by the Direct Marketing Association to curb the complaints associated with junk mail. Under this system, an addressee can call the D.M.A. and request that his name be taken off a mailing list. Unfortunately, not all direct mail advertisers use the D.M.A. mailing lists, requiring more than one request of removal. Most direct mailers do use the lists, however, thereby cutting down on the great bulk of mail. Moreover, the addressee could contact the other advertisers individually asking to have his name removed from a mailing list. *See* Barton, Testimony Before the House Subcommittee on Telecommunications and Finance 1 (May 23, 1989).

158. N.Y GEN BUS. LAW § 396-aa (McKinney Supp. 1990). The Council on State Government proposal for uniform legislation was based on this act.

159. *See* discussion of restricted user lists, *supra* notes 145-57.

160. N.Y GEN. BUS. LAW § 396-aa(1) (McKinney Supp. 1990).

The restriction is a reasonable time,[161] place, and manner[162] restriction because it satisfies the four requirements—it is content-neutral, narrowly drawn, serves a significant state interest, and leaves open alternative channels.[163] Although the statute could be criticized for not being content neutral, specifying only facsimiles promoting the sale of goods, restrictions on commercial speech need not be strictly content neutral.[164] Alternatively, the restriction could be regarded as content neutral, because it does not specify particular types of commercial facsimiles.[165] Second, the New York statute is narrowly drawn; it does not restrict more speech than necessary. The restriction also serves a significant state interest, because it protects people's investments based on their own decisions.[166] Lastly, the pages and hours restriction does not foreclose any alternative channels of advertising.[167] It only restricts advertising by fax machine. Because the statute regulates commercial speech, however, it must be analyzed using the *Central Hudson* test.

The statute satisfies the final two prongs of the *Central Hudson* test. It directly advances the state's interest in protecting its citizens' investments. The system not only allows the individual owner to determine whether to

---

161. When analyzing the reasonableness of time restrictions, it is important to keep in mind the normal activities carried on during that time. *See* Note, *supra* note 24, at 130.

The Court has had occasion to consider time restrictions on "lesser valued speech" in F.C.C. v. Pacifica Found., 438 U.S. 726 (1978) (indecent language over the radio). In *Pacifica*, a radio listener complained to the FCC after he and his son heard George Carlin's monologue "Filthy Words" at 2:00 p.m. The FCC asserted that this monologue might have been appropriate at a different time of day, when no children were present. *Id.* at 733 (The FCC "never intended to place an absolute prohibition on the broadcast of this type of language, but rather sought to channel it to times of day when children most likely would not be exposed to it.").

162. The Court has discussed manner restrictions on solicitations in Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640 (1981). In *Heffron*, the Court upheld a manner restriction confining to fixed locations persons wishing to sell, exhibit, or distribute religious materials during a state fair. The restriction did not allow solicitors to walk around and distribute their messages. In its discussion, the Court characterized the state interest as substantial and commented on the alternative forum for solicitation. *Id.* at 648-55.

163. *See supra* notes 29-32 and accompanying text.

164. *See, e.g., Metromedia*, 453 U.S. 490, 503-13. The plurality opinion distinguished and analyzed the ordinance in terms of commercial and noncommercial speech. In addition, the Court distinguished between the on-site commercial and off-site commercial uses of billboards.

165. *Compare* the New York statute *with* the invalid ordinance in Chicago Police Dept. v. Mosley, 408 U.S. 92 (1972), where picketing near public schools at certain times was prohibited, except for demonstrations during peaceful labor disputes.

166. *See* discussion of *Central Hudson*, *supra* Section I(B).

167. *See* discussion of alternative channels, *supra* notes 112-15 and accompanying text.

receive junk fax, but it also protects those who do not, by limiting the number of pages and hours. In addition, the New York statute is narrowly tailored because it allows advertisers to continue to solicit via fax to people who have not contacted them.[168] The balance between the legislature's goals and the magnitude of speech restriction is evenly weighted. The speech is restricted, but not so restricted as to be prohibitive, as in the complete ban and prior approval statutes. In addition, the state's interests are more fully advanced because the restrictions protect the machine owner during "peak" business periods. As a result, a court should have little difficulty in finding the *Central Hudson* test satisfied.

As is apparent from the language of the restrictions, the statute is a quintessential time, place, and manner restriction. The restrictions are reasonable in the limits imposed on the advertiser because they force the advertiser to obey the demands of an unwilling recipient. Moreover, the time restrictions are reasonable—most businesses do not operate between 9:00 p.m. and 6:00 a.m. The restrictions provide an advertiser with a protected medium of communication, while at the same time they provide a fax machine owner with an opportunity to halt the receipt of unwanted transmissions. The additional requirement that the transmissions not exceed five pages saves the recipient from being forced to pay a substantial amount of money for an advertisement he did not wish to receive and avoids "tying up" fax machines at night, when many non-advertising messages are also transmitted. Further, the New York statute incorporates an aspect of the "clearinghouse" statute, because a recipient can take his name off a list by making his intention clearly known to the advertiser.

There are, however, a few problems associated with this type of statute. Chief among them is the difficulty in enforcing its provisions. Limiting the pages and hours of transmission necessarily puts a burden on the recipient to verify the time and number of pages when a particular transmission is sent. Theoretically, the fax machine owner must continually monitor and record each transmission to determine the number of pages and the hour of receipt. However, these problems will be largely resolved, if Representative Markey's clearinghouse bill passes, because the bill requires all facsimile makers to include somewhere on every transmission the time, date, and number of pages sent.[169] In any case, most machines now include this feature, and so the enforcement problem is not as hopeless as it once seemed. Yet, even with these transmission records, the burden of keeping track of transmissions is still on the recipient.

---

168. It is not, however, the least-restrictive because the statute does not impose hour and page limits on unsolicited advertisements between people in a pre-existing business relationship.

169. H.R. 2921, 101st Cong., 1st Sess. § (d)(1).

Another problem with the statute is that it prohibits transmissions during peak business hours. As a result, fax advertisers may complain that the regulation is discriminatory because it denies them immediate contact with other machine owners. Because the fax recipient has not put his name on the list, he has impliedly consented to receiving facsimile transmissions. Thus, the advertisers should not be denied the opportunity to transmit advertisements when people will receive them or risk the chance that businesses will turn their machine off after work. The argument becomes more persuasive in light of the ease of inclusion in a directory or in contacting an individual advertiser.

These problems associated with the statute, however, are far outweighed by the advantages it provides for all involved. The New York statute imposing restrictions on hours and pages solves many problems that arise under the other types of restrictions. Although most other types of restrictions do not provide an exception for a prior existing business or contractual relationship,[170] the New York statute expressly exempts fax ads between people with a prior commercial relationship.[171] This exception is beneficial because it allows an advertiser to maintain contact with its business clients. Excepting transmissions of this sort also allows an advertiser to "announce" a new product line to its existing customers by sending unsolicited facsimiles. The complete ban statute would obviously prohibit such a communication because all unsolicited advertising is prohibited. Moreover, being forced to request prior approval would be too costly and would essentially foreclose this method of advertising because in requesting approval, the advertiser must necessarily divulge the contents of the facsimile.

One drawback in the drafting of this statute is that advertisements from people with prior relationships can be sent whenever the advertiser wishes and can be of any length. This is not a fatal flaw, however, because most advertisements are no longer than one or two pages. In addition, most advertisers will want to take advantage of the lower telephone rates by transmitting at night. Most importantly, an advertiser does not want to harm the existing relationship or offend his recipient by interfering with the other's machine.[172] Common sense and market forces act as deterrents to protect a recipient's investment.

Another limitation, with more serious implications, is the failure to define what is meant by a "prior business relationship." The relationship would most likely be defined by a judicial rule of reason. Among the issues to be addressed are whether a prior business relationship would

---

170. *See, e.g.,* MD. COM. LAW CODE ANN. § 14-1313 (1989).
171. N.Y GEN. BUS. LAW § 396-aa (McKinney Supp. 1989).
172. *See* Cox, *supra* note 143, at 8A.

extend to agents of one person or the other,[173] or whether a prior business relationship would ever terminate (does a minor relationship twenty years ago suffice to send an unsolicited advertisement today?).

III. Conclusion

Unsolicited facsimile advertisements are an inconvenience to some businesses, yet others undoubtedly consider such advertisements unobjectionable or even valuable. As a result, any response to the problem must balance the interests of those who are inconvenienced with the interests of those who benefit.

Since 1976, when the Court initially granted first amendment protection to purely commercial speech, the Court has struggled to define a standard to balance the competing interests. The Court formulated the *Central Hudson* four-part test to maintain the common sense distinction between commercial and noncommercial speech, and yet to provide some degree of constitutional protection to commercial speech. The test which has evolved is essentially an application of the time, place, and manner standard for noncommercial speech, at an intermediate level of scrutiny. To withstand a constitutional challenge, a restriction on commercial speech that is nondeceptive and concerns a legal activity must be narrowly tailored, serve a significant state interest, and leave open alternative forms of communication.

The recent establishment of the fax machine as an indispensable office machine has led some advertisers to fax unsolicited advertisements to unwilling consumers. In response, a substantial number of states have proposed or passed legislation in an attempt to cure the "problem" of junk fax. A review of the specific issues raised by these statutes suggests that the best solution is to allow an individual owner to give notice that he does not want to receive transmission and, in the absence of such notice, to limit transmission to those with whom the initiator has had a prior business relationship or, in the absence of such relationship, to limit transmissions to five pages between 9:00 p.m. and 6:00 a.m. Only a handful of states have passed legislation allowing the individual owner to decide whether to receive these unsolicited transmissions, and only New York has imposed hour and page limits to further protect the recipient. Thus, the New York statute provides the best current balance of the advertisers' and fax owners' competing interests.

Edwin J. Broecker*

---

173. *See* Ellis, *supra* note 5, at 20 (hypotheticals describing the definitional problems associated with the Congressional legislation).

* B.A. Wabash College, 1988; J.D. candidate Indiana University School of Law-Indianapolis, 1991.

The Proper Statute of Limitations on a Rule 10b-5 Action

I. Federal Securities Law Provisions: Background

The laws governing today's securities markets and transactions were, for the most part, passed shortly after the stock market crash of 1929. The first enactment was the Securities Act of 1933 ("1933 Act").[1] The purpose of this act was to provide investors with full disclosure of material information concerning public offerings of securities in commerce,[2] to protect investors against fraud[3] and through the imposition of specified civil liabilities,[4] to promote ethical standards of honesty and fair dealing.[5] After passage of the 1933 Act, Congress recognized the need for more extensive regulation and refinement of the 1933 Act. As a result, Congress passed the Securities Exchange Act of 1934 ("1934 Act").[6]

The purpose of the 1934 Act was to supplement and expand the regulatory measures lacking in the 1933 Act. Principally, the purpose of the 1934 Act was to protect investors against manipulation of stock prices by regulating transactions on securities exchanges[7] and in the over-the-counter markets,[8] and imposing regular reporting requirements[9] on companies whose stock is listed on national securities exchanges.[10]

Additionally, the 1934 Act contained section 10(b) which addressed the use of manipulative and deceptive devices.[11] Pursuant to section 10(b) of the 1934 Act, the Securities and Exchange Commission ("SEC")

---

1. Securities Act of 1933, 15 U.S.C. § 77a-bbbb (1988).
2. *See* 15 U.S.C. § 77j (1988).
3. *See* 15 U.S.C. § 77q (1988).
4. *See* 15 U.S.C. § 77k-l (1988).
5. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 195 (1976). *See also* H.R. Rep. No. 85, 73d Cong., 1st Sess. 1-5 (1933).
6. Securities Exchange Act of 1934, 15 U.S.C. § 78a-ll (1988).
7. *See* 15 U.S.C. § 78f (1988).
8. *See* 15 U.S.C. § 78k-l (1988).
9. *See* 15 U.S.C. § 78m (1988).
10. *See* Ernst & Ernst v. Hochfelder, 425 U.S. 185, 195 (1976). *See also* S. Rep. No. 792, 73d Cong., 2d Sess. 1-5 (1934).
11. 15 U.S.C. § 78j (1982). Part (b) of this section states:

> It shall be unlawful . . . [t]o use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

adopted Rule 10b-5 which proscribed various activities which, if engaged in, would result in civil and/or criminal liability.[12]

Even though the 1934 Act and SEC Rule 10b-5 both detail certain types of conduct in which people involved in securities transactions are prohibited from engaging,[13] neither section 10(b) nor Rule 10b-5 created express rights of action for private parties.[14] Nevertheless, not long after the adoption of Rule 10b-5,[15] the courts began to recognize that an implied civil right of action exists under the rule and section 10(b).[16] Also, in a private civil action, the Supreme Court recognized the implied right of action under Rule 10b-5 and section 10(b).[17]

Along with the recognition of an implied cause of action, there developed a new problem. The problem, the principal focus of this Note, is that when the judiciary recognizes an implied cause of action, as in the present case, there is usually no accompanying statute of limitations to govern the action. In other words, it is not clear how much time an

---

12. 17 C.F.R. § 240.10b-5 (1988). This rule states:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility or of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

13. *See supra* notes 11-12.

14. Several other sections in the 1934 Act do create express rights of action. *See, e.g.*, 15 U.S.C. § 77k (1988) (civil liabilities on account of false registration statements); 15 U.S.C. § 77l (1988) (civil liabilities arising in connection with prospectuses and communication); 15 U.S.C. § 78r (1988) (liability for misleading statements); 15 U.S.C. § 78t (1988) (liability for controlling persons).

15. *See* 13 Fed. Reg. 8183, Dec. 22, 1948, as amended at 16 Fed. Reg. 7928, Aug. 11, 1951.

16. One of the first cases to recognize a private right of action under section 10(b) and Rule 10b-5 was Kardon v. National Gypsum Co., 69 F. Supp. 512, 514 (E.D. Pa. 1946). This was an action against a corporation to recover damages for fraudulently conspiring to induce the plaintiff to sell stock in two corporations for less than its true value.

17. *See* Superintendent of Ins. of N.Y. v. Bankers Life & Casualty Co., 404 U.S. 6, 13 n.9 (1971) (action for fraud perpetrated by a purchaser who used assets of the company whose stock was being sold to purchase the very stock sold by the corporation. The Court stated that "[i]t is now established that a private right of action is implied under [section] 10(b)."). *See also* Ernst & Ernst v. Hochfelder, 425 U.S. 185, 196 (1976) (stating that "the existence of a private cause of action for violations of [section 10(b)] and [rule 10b-5] is now well established").

injured party has within which to bring a cause of action under section 10(b) or Rule 10b-5.[18] This is different from a legislatively created right of action which is typically accompanied by an applicable statute of limitations.[19]

II. The Traditional Approach When a Federal Limitations Period is Lacking

A. Background on Limitations Periods

Statutes of limitations serve many useful purposes. Importantly, the limitations period furthers the proposition that "the right to be free of stale claims in time comes to prevail over the right to prosecute them."[20] Also, statutes of limitations are "designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared."[21] Accordingly, the determination of the applicable statute of limitations in a federal action deserves important consideration.[22]

When there is no federal statute of limitations expressly applicable to a federal claim, as frequently has been the case,[23] courts should not assume Congress intended that there be no time limit at all.[24] This is

---

18. As opposed to how long the action will be viable before it expires, another consideration is at what point does this time actually begin to run. This is frequently referred to as the Federal Equitable Tolling Doctrine. For a discussion on this, see *Report of the Task Force on Statute of Limitations for Impled Actions*, 41 Bus. Law. 645, 654 (1986).

19. *See* 15 U.S.C. §§ 77m, 78i(e), 78r(c), 78cc(b), and 78p(b). *See also infra* note 148.

20. United States v. Kubrick, 444 U.S. 111, 117 (1979) (citing Railroad Telegraphers v. Railway Express Agency, 321 U.S. 342, 349 (1944)).

21. American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 554 (1973) (citing *Railroad Telegraphers*, 321 U.S. at 248-49, *reh'g denied*, 415 U.S. 952 (1974)).

22. For further discussion of various limitations periods and their importance, see Bloomenthal, *The Statute of Limitations and Rule 10b-5 Claims: A Study in Judicial Lassitude*, 60 U. Colo. L. Rev. 235 (1989). *See generally* Fischer, *The Limits of Statutes of Limitation*, 16 Sw. U.L. Rev. 1 (1986); Kaulbach, *A Functional Approach to Borrowing Limitations Periods for Federal Statutes*, 77 Calif. L. Rev. 133 (1989).

23. DelCostello v. Int'l Bhd. of Teamsters, 462 U.S. 151 (1983) (Court adopted a limitations period from section 10b of the National Labor Relations Act to be applied to section 301 of the same Act since section 301 did not have an express limitations period). *See* 29 U.S.C. § 160(b) (1982). *See also* Occidental Life Ins. Co. v. EEOC, 432 U.S. 355 (1977) (adopting federal statute of limitations for EEOC enforcement action); McAllister v. Magnolia Petroleum Co., 357 U.S. 221 (1958) (federal limitations period applied to unseaworthiness action under general admiralty law).

24. *DelCostello*, 462 U.S. at 158.

because of the resounding importance of the limitations period.[25] Instead, the task of the court is to "borrow"[26] the most suitable statute or other rule of timeliness from some other source.[27] This other source has typically been the most analogous statute of limitations under the governing state law in which the district court is sitting.[28] This is frequently referred to as the "absorption" of a state statute.[29] Until the spring of 1988,[30] the district courts and the courts of appeals had, for the most part,[31] determined that the most analogous statute of limitations was to be found in the common law fraud statute[32] or the blue sky statute of the applicable state.[33]

B. Common Law Fraud Approach

The Second,[34] Ninth,[35] and Tenth[36] Circuits consistently apply the common law fraud doctrine to section 10(b) and Rule 10b-5 claims for statute of limitations purposes. There are, however, two circuits, the Fifth[37] and the Sixth,[38] which are undecided as to which approach they

---

25. *See supra* notes 20-22 and accompanying text.

26. This is commonly referred to as the "absorption" doctrine. *DelCostello*, 462 U.S. at 158. When utilized in the present area, it frequently produces incongruous results among the various states. *See Report of the Task Force on Statute of Limitations for Implied Actions*, 41 BUS. LAW. 645, 646 (1986).

27. *DelCostello*, 462 U.S. at 158.

28. *Id. See also* Ernst & Ernst v. Hochfelder, 425 U.S. 185, 209 n.29 (1976) (stating that "[s]ince no statute of limitations is provided for civil actions under [section] 10(b), the law of limitations of the forum state is followed as in other cases of judicially implied remedies").

29. *See supra* note 26 and accompanying text.

30. *See infra* note 100 and accompanying text.

31. *But see* Cook v. Avien, Inc., 573 F.2d 685 (1st Cir. 1978) (applying Massachusetts' two-year personal injury statute as opposed to a blue sky or common fraud limitations period).

32. *See infra* notes 34-56 and accompanying text.

33. *See infra* notes 57-81 and accompanying text.

34. Armstrong v. McAlpin, 699 F.2d 79 (2d Cir. 1983) (applying New York's common law fraud statute).

35. Vucinich v. Paine, Webber, Jackson & Curtis, Inc., 739 F.2d 1434 (9th Cir. 1984) (applying California's three-year fraud statute). *See also* Davis v. Birr, Wilson & Co., Inc., 839 F.2d 1369 (9th Cir. 1988) (applying California's three-year fraud statute) (Aldisert, J., concurred but, without reliance on *In re* Data Access Securities Litigation, 843 F.2d 1537 (3d Cir. 1988), suggested an approach similar to the one that was adopted by the Third Circuit).

36. Loveridge v. Dreagoux, 678 F.2d 870 (10th Cir. 1982) (applying Utah's three-year fraud statute).

37. Breen v. Centex Corp., 695 F.2d 907 (5th Cir. 1983) (applying Texas' two-year fraud statute).

38. Marx v. Centran Corp., 747 F.2d 1536 (6th Cir. 1984) (applying Ohio's four-year fraud statute), *cert. denied*, 471 U.S. 1125 (1985).

will adopt (common law fraud or blue sky law), but have applied the common law fraud limitations period in at least one of the states included in their circuits.

Analysis of the case law[39] from the Second, Ninth, and Tenth Circuit Courts of Appeals indicates that these circuits have determined those common law fraud statutes which have been applied better effectuated the federal policies at stake than did their blue sky counterparts in the same jurisdiction.[40] One case which exemplifies the rationale for adopting the common law fraud statute is *Wood v. Combustion Engineering, Inc.*[41]

When considering which statute of limitations would apply, the *Wood* court had to decide between the Texas two-year general fraud statute[42] and the Texas three-year blue sky statute.[43] At the onset of its analysis, the court stated that the "action under Rule 10b-5 today is essentially 'fraud like' in character."[44] The court supported this proposition by saying that a "10b-5 action today requires all the essential elements of common law fraud except privity, and arguably, . . . reliance."[45] Also, the *Wood* court noted that the Supreme Court had firmly established scienter as a requirement of a 10b-5 action,[46] further bolstering this position.

The *Wood* court concluded that the fraud action and the Rule 10b-5 action had two major common elements. The court first noted the element of reliance and stated that there was no requirement of reliance under the applicable blue sky law.[47] However, the court highlighted the fact that the Texas general fraud statute had an express requirement of reliance whereby the buyer must rely on a false representation made to him by the seller. Also, the court stated that "[w]hile the precise extent of the reliance requirement under 10b-5[48] is not entirely clear,"[49] the

---

39. *See supra* notes 34-36 and accompanying text.

40. *See* Ebrahimi v. E.F. Hutton & Co., 852 F.2d 516, 520 (10th Cir. 1988). The court here adopted the Colorado general fraud statute and stated, "When borrowing a state statute of limitations, a court should look to the statute which most clearly addresses the same or similar policy considerations as those underlying the federal right." *Id.*

41. 643 F.2d 339 (5th Cir. 1981).

42. TEX. BUS. & COM. CODE ANN. § 27.01 (Vernon 1987).

43. TEX. REV. CIV. STAT. ANN. art. 581-33 (Vernon Supp. 1990).

44. *Wood*, 643 F.2d at 345.

45. *Id.*

46. *Id.* (citing Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 (1976)).

47. *Id.* at 345 n.19 (citing Berry Petroleum Co. v. Adams & Peck, 518 F.2d 402 (2d Cir. 1975)).

48. *See generally* Basic Inc. v. Levinson, 485 U.S. 224 (1987).

49. *Wood*, 643 F.2d at 345 n.13 (citing Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128 (1972) (in a non-disclosure case, the plaintiff's inability to prove reliance did not bar recovery)). Also, the Fifth Circuit decided later in Simon v. Merrill,

reliance requirement of Rule 10b-5 was more analogous to the explicit reliance requirement of the general fraud statute.

The second major consideration highlighted by the court was the element of scienter.[50] The court first noted that there was no scienter requirement under the state's blue sky law.[51] The court stated that some Texas cases required scienter to establish actionable fraud,[52] and that the Supreme Court had firmly established that scienter is required to prevail on a Rule 10b-5 action.[53]

After establishing the strong similarities between actions under the Texas general fraud statute and actions based on Rule 10b-5 and section 10(b) violations, the *Wood* court suggested some additional considerations. First, the court noted that the Texas blue sky law is limited only to purchasers according to its express terms.[54] However, the Texas general fraud claims and Rule 10b-5 and section 10(b) actions are available to both sellers and purchasers.[55] Moreover, the court stated that the blue sky law requires a tender of security as a prerequisite to recovery, whereas section 10(b) and Rule 10b-5 actions and general fraud claims do not.[56]

In conclusion, the *Wood* court held that actions under section 10(b) and Rule 10b-5 had much more in common with actions brought under the Texas general fraud statute than with the Texas blue sky statute. In support of its decision, the *Wood* court placed great weight on the fact that the fraud action and the Rule 10b-5 action were basically alike because the basic elements required to establish each action were substantially the same. Therefore, the court applied the two-year limitations period under the general fraud statute.

C. Blue Sky Approach

Until recently,[57] if the courts did not apply the common law fraud statute of limitations to the Rule 10b-5 or section 10(b) claim, then they

---

Lynch, Pierce, Fenner & Smith, Inc., 482 F.2d 880, 884 (5th Cir. 1973) that *Ute* did not do away with the requirement, and held that "some element of general reliance by plaintiff, even in non-disclosure cases, is essential to a Rule 10b-5 action." *Id.*

50. *Wood*, 643 F.2d at 345.

51. *Id.* (citing *Berry Petroleum*, 518 F.2d at 408). *See also* Bordwine, *Civil Remedies Under the Texas Securities Laws*, 8 HOUS. L. REV. 657, 674 (1971).

52. *See* Susanoil, Inc. v. Continental Oil Co., 519 S.W.2d 230 (Tex. Civ. App. 1975).

53. Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976) (held that an action will fail under section 10(b) or Rule 10b-5 if the plaintiff fails to show an intent to deceive, manipulate or defraud).

54. *Wood*, 643 F.2d at 346.

55. *Id.*

56. *Id.* (citing Wolf v. Frank, 477 F.2d 467, 475 (5th Cir.), *reh'g denied*, 478 F.2d 1403, *cert. denied*, 414 U.S. 975 (1973)).

57. *See infra* note 100 and accompanying text.

would apply the statute of limitations that was set forth in the most analogous state blue sky laws.[58] A majority of the circuits have adopted the blue sky approach. These circuits include the Fourth,[59] Seventh,[60] Eighth,[61] and Eleventh[62] Circuits. As noted above,[63] the Sixth Circuit has not adopted a unanimous position for the entire circuit, but this court recently applied the Kentucky blue sky statute, as opposed to the common law fraud statute,[64] to a Rule 10b-5 action, possibly suggesting that the circuit may be inclined to apply the blue sky limitations period as opposed to the common law fraud period in the future.[65]

The rationale underlying the adoption of the blue sky statute of limitations in the various circuits is set forth in many cases. One case which clearly sets forth the principles justifying the use of the blue sky statute of limitations period is *O'Hara v. Kavens*.[66] In *O'Hara*, the court said that "[i]t is not necessary that the state statute operate in the same fashion as the federal scheme, nor is it necessary that the state statute describe a cause of action identical to the federal cause at issue."[67] The court recognized that the blue sky statute did not require scienter.[68] However, the court held that "this distinction does not warrant an adoption of the common law fraud statute of limitations."[69] More importantly, the court reasoned, there "simply must be a commonality of

---

58. State securities laws are commonly referred to as "Blue Sky" laws. For a primer in this area, see J. Mofsky, Blue Sky Restrictions on New Business Promotions (1971).

59. O'Hara v. Kavens, 625 F.2d 15 (4th Cir. 1980) (applying Maryland's three-year blue sky statute), *cert. denied*, 449 U.S. 1124 (1981).

60. Teamsters Local 282 Pension Trust Fund v. Angelos, 815 F.2d 452 (7th Cir. 1987) (applying Illinois' three-year blue sky statute).

61. Buder v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 644 F.2d 690 (8th Cir. 1981) (applying Missouri's two-year blue sky period).

62. Friedlander v. Troutman, Sanders, Lockerman & Ashmore, 788 F.2d 1500 (11th Cir. 1986) (applying Georgia's two-year blue sky period).

63. *See supra* note 38.

64. Herm v. Stafford, 663 F.2d 669 (6th Cir. 1981) (applying Kentucky's three-year blue sky period).

65. *But see* Carothers v. Rice, 633 F.2d 7, 13 (6th Cir. 1980), *cert. denied*, 450 U.S. 998 (1981). The court applied the three-year Kentucky blue sky period but recognized the fact that the court had previously applied the common law fraud statutes in the other states in the circuit, Ohio and Michigan, as opposed to the blue sky statutes. Also, in reference to the holdings in Ohio and Michigan, the court said, "To change the statutes of limitations for federal 10b-5 claims would increase uncertainty." *Id.*

66. *O'Hara*, 625 F.2d 15 (4th Cir. 1980).

67. *Id.* at 18 (citing Morris v. Stifel, Nicolaus & Co., 600 F.2d 139 (8th Cir. 1979); Dupuy v. Dupuy, 551 F.2d 1005 (5th Cir.), *reh'g denied*, 554 F.2d 1065, *cert. denied*, 434 U.S. 911 (1977)).

68. *O'Hara*, 625 F.2d at 17.

69. *Id.*

purpose between the federal right and the state statutory scheme so that it is reasonable to subject the federal implied right to the statute of limitations provided by state law."[70] The court emphasized that both federal and state securities laws promote the same policy of full disclosure in stock transactions, and this "commonality of purpose overrides lesser distinctions which may arise in the implementation of the regulatory schemes."[71] Finally, the court stated that the shared purposes of section 10(b) and the common law fraud statute were generalized at best.[72] Therefore, the court applied the blue sky statute of limitations.

Another case applying a blue sky statute was *Friedlander v. Troutman, Sanders, Lockerman, & Ashmore*.[73] The *Friedlander* court placed heavy reliance on a Supreme Court case, *Wilson v. Garcia,*[74] decided just before *Friedlander* . The *Friedlander* court, employing the rationale from *Wilson*,[75] stated that because of "the strong federal interests in uniformity, certainty, and minimization of unnecessary litigation in determining the appropriate statute of limitations for [section] 10(b) and Rule 10b-5 claims, we hold that the federal courts must select, in each state, one most appropriate statute of limitations. . . ."[76] The court determined that the states should select the one most analogous statute as opposed to a case-by-case selection process, and noted that the blue sky law of Georgia was more analogous to the Rule 10b-5 action than was the common law fraud statute.[77] In arriving at this conclusion, the court based its reasoning on two factors.

The first factor noted by the *Friedlander* court was that the purpose of the Georgia Securities Act was the same as that of the 1933 and 1934 Acts.[78] The Georgia Act, like the federal acts, "promotes the full, accurate disclosure of information and protects against fraud in connection with the sales of securities . . . ."[79] Second, the court found that "the language of the Georgia Securities Act substantially tracks [the] language of the

---

70. *Id.* at 18.

71. *Id.* The court here, presumably, meant the fact that scienter was required for the 10b-5 action and not required under the applicable blue sky laws.

72. *Id.*

73. 788 F.2d 1500 (11th Cir. 1986).

74. Wilson v. Garcia, 471 U.S. 261 (1985). *See also infra* note 126 and accompanying text.

75. 471 U.S. at 261-62. The Court concluded that "[t]he federal interests in uniformity, certainty, and the minimization of unnecessary litigation all support the conclusion that Congress favored" the selection of one statute in each state to govern section 1983 claims as opposed to a case-by-case selection process. *Id.*

76. *Friedlander*, 788 F.2d at 1505.

77. *Id.* at 1507.

78. *Id.*

79. *Id.*

federal securities statutes,"[80] and "the case law in this circuit indicates that the Georgia blue sky law is more analogous to [section] 10(b) and Rule 10b-5 [actions] than the general fraud statute because of the closeness of purpose and language and some similarity in elements of the action."[81]

In conclusion, courts implementing the blue sky statutes of limitations rely on a slightly different approach than their common law fraud counterparts. The blue sky courts place heavy reliance on the underlying policies of the federal securities laws. The second consideration is whether the language of the blue sky statutes substantially tracks the language of the federal statutes. Finally, the blue sky courts interpret "most analogous" to mean that statute which best effectuates federal policies, as opposed to the common law fraud approach which defines "most analogous" to mean that statute which has common elements of proof.

D. Analysis of the Blue Sky and Common Law Approaches

The courts that have applied the common law fraud statutes of limitations[82] and those that have applied the blue sky limitations periods[83] to the implied actions under Rule 10b-5 and section 10(b) have decided conclusively that their respective methods provide the best limitations period for the implied federal action. The courts applying the "absorption" doctrine[84] suggest several advantages to this approach.

In arriving at their decision to use either the common law fraud or blue sky statute, the courts emphasize two underlying considerations. The first premise on which both the blue sky circuits and the common law fraud circuits agree is that use of the "absorption" doctrine has long been recognized as the proper procedure in these types of actions.[85] After deciding that a state statute should be adopted, a conflict then arises as to which state statute is most analogous.

The conflict arises in the manner in which the particular circuit interprets "most analogous." The common law fraud circuits interpret this phrase to mean the statute which best resembles the Rule 10b-5

---

80. *Id. See* GA. CODE ANN. §§ 10-5-1 to -24 (1989). For the specific anti-fraud provisions, see GA. CODE ANN. § 10-5-12 (1989).

81. *Friedlander*, 788 F.2d at 1507 (citing Kennedy v. Tallant, 710 F.2d 711 (11th Cir. 1983); Diamond v. LaMotte, 709 F.2d 1419 (11th Cir.), *reh'g denied*, 716 F.2d 914 (1983)).

82. *See supra* notes 34-56 and accompanying text.

83. *See supra* notes 57-81 and accompanying text.

84. *See supra* note 26.

85. *See* Holmberg v. Armbrecht, 327 U.S. 392, 395 (1946). *See generally* Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976); McNeal v. Paine, Webber, Jackson & Curtis, Inc., 598 F.2d 888 (5th Cir. 1979); Vanderboom v. Sexton, 422 F.2d 1233, 1237 (8th Cir. 1970).

or section 10(b) action[86] with regard to the elements required to establish the claim. The common law fraud courts frequently cite the requirement of scienter in Rule 10b-5 and section 10(b) actions as similar to the requirement in the common law fraud statutes. The common law fraud courts distinguish this requirement from the alternative blue sky approach which typically requires the defendant to prove "he did not know, and in the excuse of reasonable care could not have known of the untruth or omission."[87] Also, the common law fraud courts state that the Rule 10b-5 and section 10(b) claims are essentially fraud-like in character.[88] Thus, the common law fraud courts believe that these statutes better reflect the underlying federal action because they have similar requirements.

The blue sky courts differ on their interpretation of "most analogous." These courts emphasize that the statute selected should be the statute which best reflects the federal policy underlying the federal claim. The courts utilizing these statutes recognize the importance in having shorter, not longer, limitations periods as established by Congress for the expressed limitations provisions.[89] Additionally, the courts highlight the fact that the language in the blue sky statutes substantially tracks the language in the federal securities laws.[90] Finally, these courts stress that because the federal securities laws were enacted to correct perceived deficiencies in the common law fraud claim as it applied to securities transactions,[91] the courts would best effectuate the federal policies at stake by applying statutes with similar language and underlying policies.[92]

The "absorption" approach has several disadvantages. The first and most important problem created by the use of this particular method is the vast uncertainty that arises when Rule 10b-5 and section 10(b) actions are instituted.[93] Under the present state of the law, the limitations period applied to a Rule 10b-5 and section 10(b) claim under the "absorption" method can vary from one to ten years.[94] This

---

86. Davis v. Birr, Wilson & Co., 839 F.2d 1369, 1372 (9th Cir. 1988).

87. Wood v. Combustion Eng'g, Inc., 643 F.2d 339, 346 n.20 (5th Cir. 1981).

88. *Id.*

89. Fox v. Kane-Miller Corp., 542 F.2d 915, 918 (4th Cir. 1976).

90. Friedlander v. Troutman, Sanders, Lockerman & Ashmore, 788 F.2d 1500, 1506 (11th Cir. 1986).

91. Herman & MacLean v. Huddleston, 459 U.S. 375, 389 (1983).

92. Herm v. Stafford, 663 F.2d 669, 678 (6th Cir. 1981).

93. *See generally In re* Data Access Sec. Litig., 843 F.2d 1537 (3d Cir. 1988); DelCostello v. Int'l Bhd. of Teamsters, 462 U.S. 151 (1983); Agency Holding Corp. v. Malley-Duff & Assocs., 483 U.S. 183 (1987).

94. *See Report of the Task Force on Statute of Limitations for Implied Actions*, 41 BUS. LAW. 645, 650 (1986).

can create many problems. Importantly, it disrupts normal business[95] and prevents auditors and attorneys for publicly held corporations from being able to assess the impact of possible litigation.[96]

Consequently, neither buyers nor sellers in securities transactions can proceed efficiently if they are unsure as to when possible claims will become stale. Thus, the "absorption" approach creates uncertainty in an area of the law that is already complicated and in need of uniformity.

The second disadvantage of the "absorption" approach is that it encourages forum shopping.[97] Since the circuits are in disagreement, resulting in numerous limitations periods, the plaintiff may find it advantageous to elect not to sue in his resident state and instead bring suit in another available jurisdiction in which the suit would not be time-barred.[98] The detrimental effect of forum shopping is apparent. Even though a defendant is safe under the applicable statute of limitations applied in his state or the state in which the transaction occurred, he may still be subject to suit in other jurisdictions with longer periods.[99] Thus, the point at which the defendant's potential liability exposure will cease is unclear.

In conclusion, the "absorption" approach has the important advantage of having a large amount of supporting case law. However, this attribute is greatly, if not completely, diminished by the fact that the approach results in the application of federal securities laws which leads to incongruous results in the various jurisdictions. Surely this is not a result that was foreseen by the drafters of the 1933 and 1934 Acts.

III. Third Circuit Approach

A. In re Data Access Securities Litigation

1. Recognition of Uncertainty Surrounding This Issue.—The newest approach to the statute of limitations problem for Rule 10b-5 and section 10(b) actions was set forth by the recent Third Circuit decision

---

95. Norris v. Wirtz, 818 F.2d at 1329, 1332 (7th Cir. 1987).

96. *See supra* note 94, at 647.

97. *Id.*

98. *See* Block & Barton, *Statute of Limitations in Private Actions Under Section 10(b) - A Proposal for Achieving Uniformity*, 7 Sec. Reg. L.J. 374, 378 (1980).

99. Feldman v. Pioneer Petroleum, Inc., 606 F. Supp. 916, 921 (W.D. Okla. 1985), *aff'd*, 813 F.2d 296 (10th Cir.), *cert. denied*, 484 U.S. 954 (1987) (court discussing the uncertainty surrounding the choice of the proper limitations period when there are multiple plaintiffs).

of *In re Data Access Securities Litigation*.[100] The district court determined that the limitations period to be applied was the New Jersey common law fraud statute.[101] However, the defendants contended that the shorter statute of limitations under New Jersey's blue sky laws should have been applied.[102] Thereafter, the defendants successfully moved for certification[103] of the district court's determination, and the Third Circuit granted a petition for review to resolve the issue.

From the beginning of the court's analysis, it recognized that the Supreme Court had failed to formally address the issue of what the proper statute of limitations should be on a section 10(b) or Rule 10b-5 action.[104] Furthermore, the court emphasized the fact that since the issue had not been affirmatively decided by the Supreme Court, the problem had caused great uncertainty throughout the circuits. The court quoted extensively from Judge Easterbrook's opinion in *Norris v. Wirtz*[105] as follows: "The absence of a uniform limitations period in such actions . . . [is] one tottering parapet of a ramshackle edifice. Deciding what features of state periods of limitation to adopt for which federal statutes wastes untold hours."[106] The *Norris* court continued by stating:

> Never has the process been more enervating than in securities law. There are many potentially analogous statutes, with variations for different kinds of securities offenses and different circumstances that might toll the period of limitations. Both the bar and scholars have found the subject vexing and have pleaded, with a unanimity rare in the law for help . . . . [Finally,] the courts of appeals disagree on every possible question about limitations periods in securities cases. Only Congress or the Supreme Court can bring uniformity and predictability to this field.[107]

---

100. 843 F.2d 1537 (3d Cir.), *cert. denied sub nom.* Vitiello v. Kahlowsky and Co., 109 S. Ct. 131 (1988).

101. *See* N.J. STAT. ANN. § 2A:14-1 (West 1987). This provides for a six-year limitations period.

102. *See* N.J. STAT. ANN. § 49:3-71 (West 1989). This provides for a two-year limitations period.

103. *See* 28 U.S.C. § 1292(b) (1988).

104. *Data Access*, 843 F.2d at 1539 (citing Ernst & Ernst v. Hochfelder, 425 U.S. 185, 210 n.29 (1976)). The Supreme Court recognized the absorption doctrine but failed to establish any definitive rule.

105. 818 F.2d 1329 (7th Cir. 1987).

106. *Data Access*, 843 F.2d at 1539 (quoting *Norris*, 818 F.2d at 1332).

107. *Id.* at 1540.

The *Data Access* court next reviewed its previous rulings on this issue, *Biggans v. Bache Halsey Stuart Shields, Inc.*[108] and *Roberts v. Magnetic Metals Co.*[109]

2. Previous Third Circuit Decisions.—In *Biggans* and *Roberts*, the court concluded that the most closely analogous state statute is the common law fraud statute.[110] However, the majority in *Roberts* alluded to foreseeable change, and stated that "[m]uch can be said . . . for a different rule in a different context directing a federal court to statutes of limitations governing analogous federal causes of action."[111] Nonetheless, the court recognized that the rule established to use a state statute of limitations when a federal statute is absent was firmly established, and it would be improper for the court to change this rule.[112] Also, the dissent in *Roberts* stated, with reference to the suggested use of the most analogous federal action, "Were I writing on a clean slate, I would be inclined to adopt that approach."[113] After the court had set forth the strong interest in establishing a uniform statute, discussed the vast uncertainty that existed in the present state of the law, and reviewed its previous rulings, the court went on to analyze several recent analogous Supreme Court cases which were decided after the Third Circuit's most recent decisions on the issue.[114]

3. DelCostello v. International Brotherhood of Teamsters.—The first case cited by *Data Access* was *DelCostello v. International Brotherhood of Teamsters.*[115] In *DelCostello*, the Supreme Court decided what statute of limitations would apply where an employee sues an employer alleging the employer's breach of a collective bargaining agreement and the union's breach of its duty of fair representation by mishandling the ensuing grievances or arbitration proceedings.[116] As the starting point for its analysis, the Court recognized the generally

---

108. 638 F.2d 605 (3d Cir. 1980).

109. 611 F.2d 450 (3d Cir. 1979).

110. *See id.* at 453. The *Roberts* court concluded that since the blue sky law in question only provided a cause of action for buyers, and a seller had brought the present action, the court would utilize the limitations period of the state that would allow the seller to bring such an action. This was the common law fraud statute.

111. 611 F.2d at 454.

112. *Id.*

113. *Id.* at 463.

114. *See* Agency Holding Corp. v. Malley-Duff & Assocs., 483 U.S. 143 (1987) (Court was presented with the question of what statute of limitations would apply to RICO claims, and held that the four-year Clayton Act limitation period would apply); DelCostello v. Int'l Bhd. of Teamsters, 462 U.S. 151 (1983) (Court had to determine what the proper limitations period should be for an action brought by employees under the Labor Management Relations Act).

115. 462 U.S. 151 (1983).

116. *Id.* at 154.

accepted position that Congress intended that the courts apply the most analogous state law when a federal limitation period is lacking.[117] However, the Court made note of an exception. The Court stated that "state statutes of limitations can be unsatisfactory vehicles for the enforcement of federal law,"[118] and "it may be inappropriate to conclude that Congress would choose to adopt state rules at odds with the purpose or operation of federal substantive law."[119]

In *DelCostello*, the Court emphasized the importance of promoting federal policies:

> The Court has not mechanically applied a state statute of limitations simply because a limitation period is absent from the federal statute. State legislatures do not devise these limitations periods with national interests in mind, and it is the duty of federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of national policies. Although state law is our primary guide in this area, it is not, to be sure, our exclusive guide.[120]

Instead, the Court posited that automatic application of a state period is not an absolute rule.[121] Finally, the Court concluded that when a case involves those processes that federal labor law is designed to promote, then national uniformity in the law will be of more importance than if those processes were not in question.[122]

4. Agency Holding Corp. v. Malley-Duff & Associates.—The *Data Access* court also placed reliance upon *Agency Holding Corp. v. Malley-Duff & Associates.*[123] There the Court was presented with the issue of what limitations period should be applied to civil RICO violations.[124] After recognizing that the majority in *DelCostello* rejected the single path approach of always applying a state limitations period,[125] the Court set forth a test to be applied when a federal limitations period is lacking. The first element of the test was whether the claims arising out of the federal statute "should be characterized, [for limitations purposes], in

---

117. *Id.* at 158.

118. *Id.* at 161.

119. *Id.*

120. *Id.* (quoting Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 367 (1977) (quoting Johnson v. Ry. Express Agency, Inc., 421 U.S. 454, 465 (1975))).

121. *DelCostello*, 462 U.S. at 161.

122. *Id.* at 162-63. The Court here restated the rationale set forth in Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962).

123. 483 U.S. 143 (1987).

124. *Id.* at 146. The action was brought alleging violation of federal antitrust laws and a state law claim for tortious interference with contract.

125. *Id.*

the same way, or whether they should be evaluated differently depending upon the varying factual circumstances and legal theories in each case."[126] The purpose of the first element is to determine if each claim brought under the federal act should be judged independently on its facts to determine which limitations period should be applied, or whether all actions brought under the specific act be governed by one limitations period.

The second element of this test is whether a federal or state limitations period should be used. As recognized in *DelCostello*, application of a state limitations period is generally appropriate[127] unless "a timeliness rule drawn from elsewhere in federal law should be applied."[128] This required the court to inquire whether the particular case fell into one of those limited circumstances where the state statute is an "unsatisfactory vehicle for the enforcement of federal law,"[129] and if so, a federal period should be applied. When passing on the second element of the test, the Court stated:

> [W]hen a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial law-making, we have not hesitated to turn away from state law.[130]

Additionally, the Court stressed that uncertainty can lead to problems whereby: "Plaintiffs may be denied their just remedy if they delay in filing their claims, having wrongly postulated that the courts would apply a longer statute. Defendants cannot calculate their contingent liabilities, not knowing with confidence when their delicts lie in repose."[131]

The application of this test led the Supreme Court to adopt the statute of limitations found in the Clayton Act for application in civil RICO actions.[132] A final consideration of the Court was the nature of

---

126. *Id.* at 147 (citing Wilson v. Garcia, 471 U.S. 261, 268 (1985)).

127. This can be attributed to the Rules of Decision Act. *See* 28 U.S.C. § 1652 (1988). This act generally requires application of state law in a federal action where federal law does not "otherwise require or provide." *DelCostello*, 462 U.S. at 159 n.13. However, the *DelCostello* Court stated that "neither Erie [R.R. v. Tompkins, 304 U.S. 64 (1938)] or the Rules of Decision Act can now be taken as establishing a *mandatory* rule that we apply state law in federal interstices." *Id.* at 161 n.13 (emphasis in original).

128. *Malley-Duff*, 483 U.S. at 147 (citing *DelCostello*, 462 U.S. at 159 n.13).

129. *Id.*

130. *Id.* at 148 (citing *DelCostello*, 462 U.S. at 171-72).

131. *Id.* at 150 (citing Wilson v. Garcia, 471 U.S. 261, 275 n.34 (1985)).

132. 15 U.S.C. § 15b (1988). This section provides for a four-year statute of limitations.

the RICO statute and the various claims brought under it;[133] "a uniform statute of limitations is required to avoid intolerable 'uncertainty and time consuming litigation.'"[134]

5. Application of the Supreme Court's Rationale.—The *Data Access* court placed great reliance on the rationale in *Malley-Duff*.[135] The *Data Access* court stated that "although it has been suggested that federal courts should apply the state statute of limitations most analogous to each individual case, whenever a federal statute is silent on the proper limitations period . . . *a clear majority of the court [in DelCostello] rejected such a single path.*"[136] Next, the *Data Access* court reviewed the procedure set forth in *Malley-Duff* for determining the appropriate statute of limitations for a federal claim that is without an express limitations period. First, the court must determine whether all claims arising out of the federal statute should be characterized in the same way or should be evaluated differently depending on the various factual circumstances.[137] The claims being evaluated presently are those private civil actions brought under section 10(b) and Rule 10b-5. Second, the court must conclude whether a state or federal statute of limitations should be used.[138]

The court first turned its attention to the issue of the characterization of the claim. It stated that "[a] factual, claim-based approach to characterizing the case for limitations purposes would not promote 'the federal interests in uniformity, certainty, and the minimization of unnecessary litigation.'"[139] Thus, the court said that the "case-by-case" approach used in its prior holdings,[140] whereby the court selects the most appropriate statute in each case as opposed to one statute for all cases, would be in conflict with the recent Supreme Court holdings in *DelCostello*, *Wilson*, and *Malley-Duff*. Therefore, the court concluded that it had to

---

133. *Malley-Duff*, 483 U.S. at 149. The Court noted that "[e]ven RICO claims based on 'garden variety' business disputes might be analogized to breach of contract, fraud, conversion, tortious interference with business relation, misappropriation of trade secrets, unfair competition, usury, disparagement, etc., with a multiplicity of applicable limitations periods." *Id.*

134. *Id.* at 150 (quoting *Wilson*, 471 U.S. at 272).

135. *See supra* notes 123-34 and accompanying text.

136. *Data Access*, 843 F.2d at 1542 (citing *Malley-Duff*, 483 U.S. at 146) (emphasis in original).

137. *Id. See also Malley-Duff*, 483 U.S. at 147; *Wilson*, 471 U.S. at 268.

138. *Data Access*, 843 F.2d at 1542.

139. *Id.* at 1543 (quoting *Wilson*, 471 U.S. at 275). The court cited *Wilson* for the proposition that characterizing all claims falling under a single statute in the same manner for limitations purposes would be the best approach for effectuating the federal statute's remedial purposes. *Id.*

140. *See supra* notes 108-13 and accompanying text.

select the one most appropriate statute of limitations for all civil section 10(b) and Rule 10b-5 claims.[141]

The second and more important element of the *Malley-Duff* rationale that the *Data Access* court analyzed was what "the *one* most appropriate statute"[142] would be for section 10(b) and Rule 10b-5 actions. The *Data Access* court distinguished section 10(b) and Rule 10b-5 actions from common law fraud actions. First, the Court emphasized that it had "refused to impose in the section 10(b) scheme the traditional common law requirements in state fraud proceedings that plaintiffs establish their case by clear and convincing evidence."[143] Further, the court noted that "an important purpose of the federal securities statutes was to rectify the perceived deficiencies in the available common law protections by establishing higher standards of conduct in the securities industry."[144] Thus, because the Supreme Court differentiated the common law fraud actions and those under either section 10(b) or Rule 10b-5,[145] the *Data Access* court concluded that it should select a statute of limitations from the federal statutes.

6. Adoption of Federal Express Limitations Period.—Summarily, the court stated that the "federal schema of limitations expressly set forth in the Securities Exchange Act of 1934 'clearly provides a closer analogy than available state statutes,'"[146] and "the federal policies at stake [in section 10(b) and Rule 10b-5 actions] and the practicalities of litigation make [the federal] rule a significantly more appropriate vehicle for interstitial lawmaking."[147] Thus, after determining that the federal statute provides a better analogy, the court focused upon the various express actions in the 1934 Act which also define corresponding limitations periods.[148]

---

141. *Data Access*, 843 F.2d at 1544.

142. *Id.* (emphasis in original).

143. *Id.* (citing Herman & MacLean v. Huddleston, 459 U.S. 375, 390 (1983)).

144. *Id.* (citing *Huddleston*, 459 U.S. at 389).

145. *Huddleston*, 459 U.S. at 389. The Court held that people seeking recovery under section 10(b) would only have to prove their case by a preponderance of the evidence as opposed to the clear and convincing requirement used in civil fraud actions. The purpose of this requirement was to make it easier to prove violations of section 10(b) which, in effect, imposed more stringent standards of conduct in the securities industry.

146. *Data Access*, 843 F.2d at 1545 (quoting *DelCostello*, 462 U.S. at 172).

147. *Id.* (brackets in original).

148. *Id.* at 1545-46. 15 U.S.C. § 77m (1988) states:

> No action shall be maintained to enforce any liability created under section 77k or 77l(2) of this title unless brought within *one* year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence, or, if the action is to enforce a liability created under section 77l(1) of this title, unless brought within one year

Aside from one exception,[149] all of the 1934 Act express actions contain the one-year-after-discovery and three-years-after-the-violation limitations periods. The *Data Access* court stated that the "legislative history in 1934 makes it pellucid that Congress included a statute of repose because of fear that lingering liabilities would disrupt normal business and facilitate false claims."[150] Moreover, "[i]t was understood that the three-year rule was to be absolute."[151] Finally, the court stated:

> [T]here is a strong federal interest in requiring [the plaintiff] to file suit quickly. First an early action will alert other shareholders to possible misconduct in the affairs of the corporation. Second, the shorter period permits the company's management to treat a given securities transaction as closed, allowing them to proceed more confidently with running the company.[152]

The court then recognized that all of the companion provisions[153] to section 10(b) reflect the common purpose of the Securities Act of 1934.[154] Therefore, in adopting the one-year/three-year limitations period, the court concluded that "[i]t is difficult to consider a limitations statute that better reflects the 'federal policies at stake' and the 'practicalities of litigation' in a case based on the Securities Exchange Act of 1934

---

after the violation upon which it is based. In no event shall any such action be brought to enforce a liability created under section 77k or 77l(1) of this title more than three years after the security was bona fide offered to the public, or under section 77l(2) of this title more than three years after the sale.

15 U.S.C. § 78i(e) (1988) states in part:

> No action shall be maintained to enforce any liability created under this section, unless brought within *one* year after the discovery of the facts constituting the violation and within *three* years after such violation.

15 U.S.C. § 78r (1988) states:

> No action shall be maintained to enforce any liability created under this section unless brought within *one* year after the discovery of the facts constituting the cause of action and within *three* years after such cause of action accrued.

149. *See* 15 U.S.C. § 78p(b) (1988). Also known as section 16(b) of the 1934 Act, this section sets a two-year statute of limitations for violations related to the profits from purchase and sale of securities within six months.

150. *Data Access*, 843 F.2d at 1546 (citing *Norris*, 818 F.2d 1329, 1332 (7th Cir. 1987)).

151. *Id.*

152. *Id.* (citing *Roberts*, 611 F.2d 450, 463 (Seitz, C.J., dissenting)).

153. *See supra* note 148 and accompanying text.

154. *Data Access*, 843 F.2d at 1548 (stating that the common purpose of the Act was to "provide full and fair disclosure of the character of securities sold in interstate and foreign commerce and through the mails, and to prevent fraud in the state thereof, and for other purposes"). *See also* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975).

than those provisions of the Act that explicitly and expressly state such a period."[155]

B. Analysis of the Third Circuit Approach

As with the "absorption" approach utilized by the other circuits, the method exemplified by the Third Circuit in *Data Access* was thought to be the best method available for effectuating the policies underlying the federal securities laws.[156] The rationale set forth in the Third Circuit is persuasive and includes several advantages over the "absorption" approach.

The primary advantage is that the federal period is taken from the federal securities laws themselves, not a court-selected analogous state statute.[157] Congress intended that this period, the one-year/three-year period, would apply to those actions expressly created by the 1933 and 1934 Acts. Because Congress adopted a relatively short period for the expressed actions,[158] it can be argued that this time period should be applied to the implied action as well.

Moreover, the Third Circuit approach would completely eliminate any uncertainty among the circuits. Simply stated, the approach of the *Data Access* court requires the application of the express limitations period in the federal securities laws which is the flexible one-year/three-year period.[159] Therefore, it would no longer be important, for limitations purposes, to know where the action would be brought.[160] Along the same lines, the Third Circuit approach would eliminate the likelihood of forum shopping because the limitations period would be uniform. Accordingly, defendants would know exactly when their liability exposure was extinguished (three years after the violation) as opposed to the "absorption" approach which would require them to ascertain all of the potential plaintiffs and those forums in which the plaintiffs may bring a suit to accurately determine when their potential liabilities were eliminated.

When this argument has been suggested before,[161] opponents of the Third Circuit approach have proposed that the three-year mandatory limitations period should not apply to Rule 10b-5 and section 10(b)

---

155. *Data Access*, 843 F.2d at 1549 (emphasis in original).

156. *Id.*

157. *Id.*

158. *See supra* note 148.

159. 843 F.2d at 1550.

160. *See* Feldman v. Pioneer Petroleum, Inc., 606 F. Supp. 916, 921 (W.D. Okla. 1985), *aff'd*, 813 F.2d 296 (10th Cir. 1979), *cert. denied*, 484 U.S. 954 (1987).

161. *See supra* note 98.

claims because of the scienter requirement under these actions.[162] The opponents emphasize the fact that the express actions set forth in the 1933 and 1934 Acts merely require negligence, and therefore a longer period should apply to the Rule 10b-5 and section 10(b) claims.[163] However, a flaw in this attack is apparent when one reviews section 9(e) of the 1934 Act. This section is expressly limited to willful violations. Nevertheless, it maintains the same limitations period as the express actions which are judged by a negligence standard.[164] Therefore, it is appropriate to apply this limitations period to the Rule 10b-5 and section 10(b) actions.

A drawback of this approach is that it disregards the long established precedent of the "absorption" doctrine. Although the argument is generally valid, the Supreme Court, as noted in *Data Access*,[165] has begun to recognize that the "absorption" doctrine is not to be applied automatically.[166] The holdings in *Malley-Duff* and *DelCostello* suggest that courts have grounds to inquire into whether there is an expressed federal limitations period that better effectuates the federal policies underlying the implied federal claim as opposed to the most closely analogous state statute under the "absorption" doctrine. Therefore, under the rationale set forth in the Supreme Court holdings, *Data Access* should survive an attack which purports that this approach is in defiance of a long standing line of precedent.

The approach exhibited by the Third Circuit has several merits. Promoting federal policies and eliminating uncertainties are important considerations which result from following this approach. Also, although the approach is not recognized in precedent, the existing precedent in the various circuits is wholly inconsistent. Therefore, one could conclude that incongruous precedent leading to completely inconsistent results is of no value because the purpose of precedent is to provide uniformity and consistency throughout the courts. Finally, prior Supreme Court decisions give the newer approach established by the Third Circuit a solid foundation upon which to stand.[167]

IV. Conclusion

The federal securities laws provide important supervision and regulation of the national securities markets and transactions related therein.

---

162. *See* Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 (1976).
163. *See* Block & Barton, supra note 98, at 382.
164. *Id.*
165. *Data Access*, 843 F.2d at 1548.
166. *See Malley-Duff*, 483 U.S. at 146.
167. *See supra* notes 115-34 and accompanying text.

Also, limitations periods serve many useful purposes. Nevertheless, the effectiveness of the securities laws is weakened when there are various limitations periods which are applicable to the same cause of action.

Several approaches have been implemented by the various circuits. These approaches utilize either the common law fraud limitations period of the state, the blue sky limitations period of the state, or the expressed limitations period of the federal securities laws.

The Third Circuit approach is best adapted to resolving the present problem. This conclusion is premised on several facts. First, the federal period completely reduces uncertainty, which is a problem under the "absorption" approach. Second, and more importantly, the Third Circuit approach effectuates federal policies by applying the period originally devised by Congress for similar actions. That period is one-year from the date of discovery and three-years from the actual violation.

Finally, this approach of deferring to express federal limitations periods has been approved by the Supreme Court in several of its recent holdings. Recognition by the Supreme Court that state statutes should not be used automatically provides foundation upon which the newer formulation exemplified by *Data Access* can stand. Therefore, adoption of the federal limitations period set forth for similar actions which are expressly defined in the 1934 Act would be the best limitations period for Rule 10b-5 and section 10(b) actions.

CHRISTOPHER J. FRANZMANN*

---

* B.S. Indiana University, 1988; J.D. candidate Indiana University School of Law-Indianapolis 1991.

The author acknowledges with gratitude the assistance of Rose Thomas, J.D. 1990, Indiana University School of Law-Indianapolis, in the preparation of this Note.

Pay Me Now or Pay me Later?: The Question of Prospective Damage Claims For Genetic Injury in Wrongful Life Cases

Melanie Meredith, a profoundly retarded adult lacking any muscle control, became pregnant as the result of being raped by another patient of Riverview nursing home where she resided.[1] Her condition remained undetected for approximately five months.[2] During this time, she received no prenatal care and remained on a regular regimen of the drug Dilantin.[3] She gave birth to a son, Jacob.[4]

In August of 1989, Jacob became the first person in Indiana to successfully state a claim for wrongful life.[5] Wrongful life actions are brought by, or on behalf of, a child who suffers some impairment associated with his life. The child alleges that the defendant's negligence led to his birth. Generally, children bringing wrongful life actions suffer severe congenital defects.[6] The suits typically name a health care provider who negligently fails to inform or misinforms a prospective parent of the risks associated with bearing the child.[7] For example, a doctor

---

1. Cowe by Cowe v. Forum Group Assoc., 541 N.E.2d 962, 964 (Ind. Ct. App. 1989).

2. *Id.* at 967.

3. *Id.* When taken during pregnancy, Dilantin, an antispasmodic, induces changes in the fetal genetic structure resulting in a variety of birth defects including both physical deformities and mental deficiencies. This is known as Fetal Hydantoin Syndrome. *See* Hunson & Smith, *The Fetal Hydantoin Syndrome*, 87 J. PEDIATRICS 285 (1975).

4. *Id.* at 964.

5. Initially, the tort of wrongful life must be differentiated from the closely related torts of "wrongful conception," "wrongful pregnancy" and "wrongful birth." Both "wrongful conception" and "wrongful pregnancy" claims are brought after a negligently performed sterilization or failed contraceptive leads to the birth of an unplanned, but healthy child. This action belongs to the parents who can recover damages to compensate for the costs associated with pregnancy and delivery of the child. *See, e.g.*, Garrison v. Foye, 486 N.E.2d 5, 7 (Ind. Ct. App. 1985).

6. *See, e.g.*, Harbeson v. Parke-Davis, 98 Wash. 2d 460, 656 P.2d 483 (1983) (Fetal Hydantoin Syndrome); Turpin v. Sortini, 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982) (total deafness); Procanik by Procanik v. Cillo, 97 N.J. 339, 487 A.2d 755 (1984) (Congenital Rubella Syndrome); Berman v. Allen, 80 N.J. 421, 404 A.2d 8 (1979); Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 872, 413 N.Y.S.2d 895 (1978); Azzolino v. Dingfelder, 315 N.C. 103, 337 S.E.2d 528 (1985), *cert. denied*, 479 U.S. 835 (1986), *reh'g denied*, 319 N.C. 227, 353 S.E.2d 401 (1987) (children born with Down's syndrome); Goldberg v. Ruskin, 113 Ill. 2d 482, 499 N.E.2d 406 (1986) (Tay-Sachs disease); Speck v. Finegold, 286 Pa. Super. 342, 408 A.2d. 496 (1979); Park v. Chessin, 60 A.D.2d 80, 400 N.Y.S.2d 110 (1977) (polycystic kidney disease); Gallagher v. Duke Univ., 638 F. Supp. 979 (M.D.N.C. 1986) (Trisomy 9); Bruggeman v. Shimke, 239 Kan. 245, 718 P.2d 635 (1986) (multiple congenital abnormalities).

7. *See supra* note 6.

tells a woman that her first trimester bout with rubella will not harm the fetus,[8] or a laboratory negligently performs a test for Tay-Sachs disease which leads a couple to proceed with conception, resulting in the birth of a child afflicted with the disorder.[9] The claimant seeks compensation for those costs associated with his disorder. Wrongful birth is the equivalent action for the parents who may also seek to recover the special costs associated with bearing and rearing the affected child.

Although wrongful birth claims have received some acceptance, the child's claim is most often rejected.[10] Frequently, courts denying a wrongful life action express a reluctance to determine that a severely, or even fatally, impaired child has been damaged by his birth. This rationale makes the *Cowe* decision remarkable because Jacob, unlike most other wrongful life plaintiffs, is currently in perfect health.[11]

In his suit against Forum Group Associates, the owners of Riverview nursing home, Jacob sought "medical attention, care, support, maintenance and education until he reached the age of twenty-one,"[12] based on claims of imputed paternity, wrongful life, negligence, and prenatal tort.[13] Although the trial court dismissed the case for failure to state a claim,[14] the Indiana Court of Appeals, in a brief majority opinion, determined that a wrongful life claim is a valid cause of action in Indiana.

The decision is based on two novel rationales. First, the court expanded the definition of wrongful life to "include a situation where, as in Jacob's case, both parents are so severely mentally or physically impaired as to render them incapable of affirmatively deciding to have

---

8. Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967).

9. Curlender v. Bio-Science Laboratories, 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (1980).

10. Only seven states have recognized a cause of action for wrongful life: California (Andalon v. Superior Court (Plowman), 208 Cal. Rptr. 899, 162 Cal. App. 3d 600 (1984)); Colorado (Continental Casualty Co. v. Empire Casualty Co., 713 P.2d 384 (Co. Ct. App. 1985)); Illinois (Goldberg v. Ruskin, 113 Ill. 2d 482, 499 N.E.2d 406 (1986)); Indiana (Cowe by Cowe v. Forum Group Assoc., 541 N.E.2d 962 (Ind. Ct. App. 1989)); New Jersey (Procanik by Procanik v. Cillo, 97 N.J. 339, 478 A.2d 755, (1984)); North Carolina (Azzolino v. Dingfelder, 315 N.C. 103, 337 S.E.2d 528 (1985), *cert. denied*, 479 U.S. 835 (1986), *reh'g denied*, 319 N.C. 227, 353 S.E.2d 401 (1987)); Washington (Harbeson v. Parke-Davis, Inc., 98 Wash. 2d 460, 656 P.2d 483 (1983)).

11. *Cowe*, 541 N.E.2d at 973 (Ratliff, C.J., dissenting).

12. *Id.* at 965. The court limited any potential recovery to costs incurred during the period of time prior to Jacob's adoption by the Cowe family (approximately ten months). Under IND. CODE ANN. § 31-3-1-9 (Burns Supp. 1989) the adoptive parents assume all responsibility, including financial, upon adoption.

13. *Cowe*, 541 N.E.2d at 965.

14. *Id.* at 964.

a child . . . and where but for the custodian's negligent care of both parents, the child would not have been conceived."[15] The defendant's negligence caused a child to be born without a parent to support him. Allowing the child some form of recovery, the majority stated, responds to "the needs of the living."[16]

Second, the majority considered a medical inventory report, drafted prior to Jacob's birth, suggesting that "[Jacob] is at a 10% risk for Fetal Hydantoin Syndrome. This evidence is conclusive that Jacob has or had a chance of physical injury due directly to Forum's negligence in prescribing and administering the drug Dilantin to Melanie while Jacob was *in utero*."[17] However, at the time of the trial, Jacob displayed no physical injuries associated with the Syndrome.[18] Testimony suggested that the existence and extent of Jacob's injuries may be established by the time he reaches his fifth birthday.[19]

At first blush, the decision in *Cowe* may seem anomalous. In every successful wrongful life action to date, the claimant's disorders were both severe and obvious from the time of birth.[20] In contrast, Jacob's only injuries were his birth to "incapable" parents and a minimal chance of suffering some undeterminable effects of Fetal Hydantoin Syndrome.[21] However, the decision in *Cowe* should not be dismissed as merely an attempt to reach an equitable solution to peculiar circumstances. The decision raises important questions concerning the scope and purpose of the wrongful life cause of action, particularly regarding the type of injuries that should be compensated under the claim.

First, should a child be allowed to bring suit based on his family circumstances or legal status? Historically, wrongful life cases claiming the plaintiff's family or legal status as an injury have been uniformly rejected.[22] The possibility of allowing such an action is astounding. Any child dissatisfied with his family situation could bring suit: illegitimate children, children born to drug addicts, the eleventh child of a single welfare mother. Of course, the action could be limited to special circumstances, such as those in *Cowe*, but where will the lines be drawn?

---

15. *Id.* at 968.
16. *Id.*
17. *Id.* at 967. *See supra* note 3 for a definition of Fetal Hydantoin Syndrome.
18. *Id.* at 973 (Ratliff, C.J., dissenting).
19. *Id.*
20. *See supra* note 6.
21. Cowe, 541 N.E.2d at 966.
22. *See infra* notes 117-23 and accompanying text for discussion of family status injuries.

Second, what role, if any, should prospective damages play in wrongful life claims?[23] Advances in preconceptive and prenatal diagnostic and care methods afford the parent the opportunity to make childbearing decisions with a more complete knowledge of the potential risks. Through pre-conceptive genetic counseling and procedures such as amniocentesis and chorionic villi sampling, a number of serious disorders can be predicted and/or measured.[24] These techniques, when used properly, can help prevent unnecessary pain—physical and emotional—as well as financial burden to both the parent and child. However, the negligent misuse or non-use of these diagnostic procedures may lead to the birth of a defective child.[25] Yet, a child seeking to recompense this wrong may never be fairly compensated.

The character of many of the congenital defects asserted in wrongful life claims creates a number of difficulties when seeking recovery. As with Jacob's claim of Fetal Hydantoin Syndrome, many of the disorders involve speculative and/or late manifesting complications. For example, while a child suffering from spina bifida is recognizable at birth, a child with neurofibromatosis[26] may exhibit no symptoms or only those as minor as small, flat spots on the skin. Benign tumors could also develop, or the patient may exhibit a proclivity to malignancies. The child may suffer from only one such manifestation, or from several in varying degrees. Finally, in some conditions, the disorder may never

---

23. BLACK'S LAW DICTIONARY 206 (Abridged 5th ed. 1979), defines prospective damages as, "Damages which are expected to follow from the act or state of facts made the basis of a plaintiff's suit; damages which have not yet accrued, at the time of the trial, but which, in the nature of things, must necessarily, or most probably, result from the acts or facts complained of."

24. For helpful guides to the use variety of preconceptive and prenatal diagnostic techniques, see S. ELIAS & G. ANNAS, REPRODUCTIVE GENETICS & THE LAW (1987) [hereinafter ELIAS & ANNAS]. Currently, through techniques such as chorionic villi sampling, ultrasonography, amniocentesis and fetoscopy, a significant number of inherited and environmentally induced genetic traits are detectable. For example, approximately 142 inherited genetic traits are potentially diagnosable prenatally including Tay-Sachs, sickle cell disease, polycystic kidney disorders and myotonic dystrophy. *Id.* at 91. A substantial number of these are not readily apparent at birth. The tremendous impact of genetic technology is realized when considering that as many as forty percent of all childhood deaths may be attributable, at least in part, to genetic factors. Reilly, *Genetic Counseling: A Legal Prospective*, in COUNSELING IN GENETICS 311 (1979).

25. *See, e.g.*, Curlender v. Bio-Science Laboratories, 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (1980).

26. SLOAN-DORLAND ANN. MEDICAL-LEGAL DICTIONARY 493 (1987), defines neurofibromatosis as: "[A] familial condition characterized by developing changes in the nervous system, muscles, bones and skin marked superficially by the formation of multiple penduculated soft tumors (neurofibromas) distributed over the entire body associated with areas of pigmentation. Also called von Ricklinghouse disease." The condition is popularly known as that which afflicted John Merrick, the Elephant Man.

materialize despite the presence of the necessary genetic coding. For example, only eighty percent of persons with the genetic structure for myotonic dystrophy ever experience any symptoms.[27]

The variance in severity and occurrence times of many congenital defects creates an obstacle to using the standard recovery procedure of bringing a single action seeking compensation for all damage. Currently, where the physical manifestations of an injury do not occur within the prescribed period of limitations, the plaintiff's chances of recovery are minimal. Yet, a plaintiff with a late manifesting disorder is as damaged as one whose affliction is immediately identifiable. It is incongruous to deny recovery to one of two plaintiffs where both were wronged in the identical manner simply because one's injuries do not manifest themselves until later.

Negligence of a health care provider subjects the provider to liability. But, how far should liability be extended where the question is one of prospective injury? At what point does speculation and educated guessing regarding the existence and amount of damages create an inequity to the health care provider or the plaintiff? The decision to award prospective damages to wrongful life claimants as compensation for costs associated with latent disorders must be made with an awareness of the procedural and equitable hurdles involved.

This Note will examine the issues of allowing a plaintiff claiming a family or legal status injury to bring suit as well as awards of prospective damages in wrongful life claims. First, the development of wrongful life claims will be outlined. The necessary elements of the tort—duty, breach, causation and damage—will then be discussed individually to assess the conclusions of the court in *Cowe*. This Note concludes that although family status injuries are unacceptable grounds for bringing a wrongful life action, prospective damages for latent injury can and should be awarded.

I. History

The claim of wrongful life has undergone a significant metamorphosis. The Illinois Court of Appeals first considered wrongful life in *Zepeda v. Zepeda*.[28] In *Zepeda*, an illegitimate child sought recovery

---

27. Robbins, Pathological Basis Of Disease 1392 (4th Ed. 1989), defines myotonic dystrophy as a benign disorder leading to weakness and myotonia (difficulty in relaxing) of the distal muscles (e.g. feet and hands). A patient with myotonic dystrophy has difficulty relaxing contracted muscles in order to perform ordinary functions such as loosening a grip or changing position. Onset age ranges from infancy to middle age. The disorder is also often accompanied by cataracts, testicular atrophy and cardiac involvement. *Id.*

28. 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963).

from his natural father for those disadvantages associated with his status.[29] The court denied recovery, saying that recognition of the plaintiff's claim meant the creation of a new tort. "The legal implications of such a tort are vast, the social impact could be staggering."[30]

Three years later, the New York Court of Appeals heard *Williams v. State*.[31] Like the plaintiff in *Zepeda*, the petitioner in *Williams* sought recovery based on her legal status. The infant was born out of wedlock to a patient in a state mental hospital as the result of a sexual assault.[32] The plaintiff alleged that the state's negligence in allowing her to be conceived "deprived her of property rights, a normal childhood and home life, proper parental care, support and rearing, and caused her to bear the stigma of illegitimacy."[33] Dismissing the claim, the court held that being born to one set of circumstances instead of another is not a cognizable wrong.[34]

An impaired child first sought relief in *Gleitman v. Cosgrove*.[35] Mrs. Gleitman contracted rubella very early during the first trimester of her pregnancy.[36] She informed her treating physician of this fact, but was assured that it would not affect the child.[37] The infant, Jeffery, appeared normal at birth.[38] Subsequently, he displayed severe defects in sight, hearing and speech.[39] Both Jeffery and his parents brought suit.[40] The Supreme Court of New Jersey dismissed Jeffery's claim, pointing to what it considered the impossibility of measuring damages based on the difference between "his life with defects and the utter void of nonexistence."[41] The court also denied the parents' claim for wrongful birth, saying that allowing the claim would be inapposite to public policy supporting the sanctity of human life.[42]

---

29. *Id.* at 246, 190 N.E.2d at 849. The plaintiff complained of "being deprived of the normal home that might have been his," as well as for the loss of the love and affection that he would have had he been born a normal child. *Id.*
30. *Id.* at 259, 190 N.E.2d at 858.
31. 18 N.Y.2d 481, 223 N.E.2d 343, 276 N.Y.S.2d 885 (1966).
32. *Id.* at 482, 223 N.E.2d at 343, 276 N.Y.S.2d at 886.
33. *Id.*
34. *Id.* at 484, 223 N.E.2d at 344, 276 N.Y.S.2d at 886.
35. 49 N.J. 22, 227 A.2d 689 (1967).
36. *Id.* at 24, 227 A.2d at 690.
37. *Id.*
38. *Id.*
39. *Id.* at 25, 227 A.2d at 690.
40. *Id.* at 26, 227 A.2d at 691.
41. *Id.* at 28, 227 A.2d at 692.
42. *Id.* at 30, 227 A.2d at 693. *But see* Berman v. Allen, 80 N.J. 421, 404 A.2d 8 (1979) (child born with Down's Syndrome not allowed to recover, but parents granted award to cover the special costs associated with raising the child).

Park v. Chessin[43] represents the first attempt to claim wrongful life where the alleged negligence occurred prior to conception. Mrs. Park's first child died within an hour of birth from a hereditary kidney disorder.[44] Before conceiving again, the Parks sought the advice of a doctor regarding the possibility of a second child suffering the same condition. Relying on his incorrect advice, the Parks decided to have another child. Tragically, the child was born with the same disorder and lived only two and one half years. In recognizing a claim for both the Parks and their infant, the court commented that the law must mirror the changes in technology, economics, and social attitudes.[45] Where technology can predict with reasonable certainty that a child would be born deformed, the court said, "children have a right to be born whole, functional human beings."[46] This victory for wrongful life proponents was short lived. The next year in *Becker v. Schwartz*,[47] the court overturned *Park*, stating that it was incompetent to measure a life with deformities against a life without.[48]

The court in *Curlender v. Bio-Science Laboratories*[49] recognized the validity of a wrongful life claim. As with most watershed cases, the facts were compelling. The Curlenders sought genetic counseling to determine whether they carried the gene for Tay-Sachs disease.[50] Relying on faulty test results, the Curlender's conceived a child afflicted with the disease. The child sought damages for emotional distress as well as the deprivation of 72.6 years of life[51] and $3 million in punitive damages on the grounds that the defendants knew their testing procedures were likely to produce a substantially high number of false-negatives, and yet proceeded to use them "in conscious disregard of the health, safety and well-being of the plaintiff."[52] The court allowed both general and special damages, concluding that the infant has a

---

43. 60 A.D.2d 80, 400 N.Y.S.2d 110 (1977).
44. *Id.* at 83, 400 N.Y.S.2d at 111.
45. *Id.* at 88, 400 N.Y.S.2d at 114.
46. *Id.*
47. 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978).
48. *Id.*
49. 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (1980).
50. *Id.* at 815 n.4, 165 Cal. Rptr. at 480 n.4. Tay-Sachs is a fatal progressive degenerative disease of the nervous system, characterized by partial or complete loss of vision, mental underdevelopment, softness of the muscles, and convulsions, which primarily afflicts the Eastern European Jewish population and their progeny. Only in the circumstance where both parents are carriers will there be a great likelihood of the presence of the disease in the offspring. The condition can be screened for through a relatively simple blood test. *Id.*
51. *Id.* at 818, 165 Cal. Rptr. at 481.
52. ELIAS & ANNAS, *supra* note 24, at 115.

right of action when it is born defective and its "painful existence is a direct and proximate result of negligence by others."[53] The decision also noted that children continue to sue for wrongful life because of the seriousness of the wrong, "understanding that the law reflects, perhaps later than sooner, basic changes in the way society views such matters."[54] Two years later, the California Supreme Court partially overruled *Curlender* in *Turpin v. Sortini*,[55] which held that a plaintiff could not recover general damages for wrongful life because of the impossibility of comparing the value of an impaired to a non-impaired life.

In the ten years between the *Curlender* and *Cowe* decisions, only three other states have allowed awards in wrongful life cases.[56] In the Washington case of *Harbeson v. Parke-Davis*, the plaintiff's mother was an epileptic on a regular regimen of Dilantin.[57] The Harbesons inquired as to the risks of birth defects associated with the drug, and were assured that it would cause no difficulty.[58] Subsequently, two children were born with congenital deafness and other physical and mental deformities resulting from *in utero* exposure to the drug.[59] The children recovered extraordinary expenses, such as medical and special educational costs, incurred during their lifetime as a result of the defects.[60] The court recognized that scientific advancements should be used to protect children.[61]

In *Procanik by Procanik v. Cillo*,[62] the Supreme Court of New Jersey reversed its earlier decision in *Gleitman v. Cosgrove*,[63] allowing

---

53. *Curlender*, 106 Cal. App. 3d at 824, 165 Cal. Rptr. at 486.
54. *Id.* at 828, 165 Cal. Rptr. at 487.
55. 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982).
56. The following states do not allow a cause of action for or otherwise recognize wrongful life: Florida (Moores v. Lucas, 405 So. 2d 1022 (Fla. Dist. Ct. App. 1981)); Idaho (Blake v. Cruz, 108 Idaho 253, 698 P.2d 315 (1985)); Kansas (Bruggeman v. Schimke, 239 Kan. 245, 718 P.2d 635 (1986)); Louisiana (Pietre v. Opelousas Gen. Hosp., 517 So. 2d 1019 (La. 1987)); Michigan (Proffitt v. Bartolo, 162 Mich. App. 35, 412 N.W.2d 232 (1987)); New Hampshire (Smith v. Cote, 128 N.H. 231, 513 A.2d 341 (1986)); New York (Alquijay v. St. Luke's-Roosevelt Hosp. Center, 63 N.Y.2d 978, 473 N.E.2d 244, 483 N.Y.S.2d 994 (1984)); Pennsylvania (Ellis v. Sherman, 330 Pa. Super. 42, 478 A.2d 1339 (1984), *aff'd*, 515 A.2d 1327 (1986)); Texas (Nelson v. Krusen, 678 S.W.2d 918 (Tex. 1984)); West Virginia (James G. v. Caserta, 332 S.E.2d 872 (W.Va. 1985)); Wisconsin (Dumer v. St. Michael Hosp., 69 Wis. 2d 766, 233 N.W.2d 372 (1975)).
57. 98 Wash. 2d 460, 656 P.2d 483 (1983).
58. *Id.* at 463, 656 P.2d at 483.
59. *Id.*
60. *Id.* at 483, 656 P.2d at 496-97.
61. *Id.* at 481, 656 P.2d at 496.
62. 97 N.J. 339, 478 A.2d 755 (1984).
63. 49 N.J. 22, 227 A.2d 689 (1967).

a child afflicted with congenital rubella syndrome to recover special costs associated with his disorder. The *Cowe* decision adds two new factors to the development of wrongful life cases: Under very limited circumstances, a child can recover for the injury of being born to a specified type of parent. He can also now recover for prospective injury.

II. The Wrongful Life Tort: The Elements of Negligence

To succeed on a claim of wrongful life, the plaintiff must present a standard prima facie showing of negligence. A legally recognizable duty must be owed to the plaintiff, the breach of which is the proximate cause of the plaintiff's injury.[64] These elements will be discussed individually; first to define their role in the wrongful life tort, and second to assess the result in *Cowe*.

A. Duty

Generally, duty in a wrongful life action is premised on the theory of informed consent[65] which imparts upon a physician the duty to disclose any facts "which are necessary to form the basis of an intelligent consent by the patient to the proposed treatment."[66] If a physician knows, or reasonably should know, of information regarding possible defects a child may possess, either immediately or in the future, this information must be made available to the parents.[67] Full disclosure affords the parents an opportunity to make an informed decision

---

64. W. Keeton, Prosser and Keeton on The Law of Torts 164 (5th ed. 1984) [hereinafter Prosser & Keeton].

65. *See* Harbeson v. Parke-Davis, 656 P.2d 483 (Wash. 1983). *See also* Capron, *Informed Decision Making in Genetic Counseling: A Dissent to the Wrongful Life Debate*, 48 Ind. L.J. 581 (1973).

66. Salgo v. Leland Stanford Jr. Univ. Bd. of Trustees, 154 Cal. App. 2d 560, 317 P.2d 170, 181 (1957).

67. *See* Jacobs v. Theimer, 519 S.W.2d 846 (Tex. 1975) (physician has duty to make reasonable disclosure of diagnosis of maternal disease and subsequent risks of pregnancy); Stewart v. Long Island College Hosp., 58 Misc. 2d 432, 296 N.Y.S.2d 41 (1968), *modified*, 35 A.D.2d 53, 313 N.Y.S.2d 502 (1970), *appeal dismissed*, 27 N.Y.2d 804, 264 N.E.2d 354, 315 N.Y.S.2d 863, *appeal granted*, 27 N.Y.2d 489, 267 N.E.2d 280, 318 N.Y.S.3d 1025 (1970), *aff'd*, 30 N.Y.2d 695, 283 N.E.2d 616, 332 N.Y.S.2d 640 (1972) (recognized obligation of physician to disclose to his patient serious or statistically frequent risks of a proposed procedure but denied recovery for wrongful life based on inability to award damages). *But see* Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d. 689 (1967) (informed consent does not include duty on part of doctor to inform mother of possibility of birth defects resulting from rubella so that patient could obtain an abortion).

whether to conceive, or in some circumstances, abort the fetus.[68]

Decisions allowing recovery to parents in wrongful birth actions also recognize this duty to inform.[69] Where a health care practitioner negligently fails to fully disclose information regarding the child, his failure is considered a breach of duty to the parents.[70] Subsequent birth of an impaired child is an injury to the parents who can seek recovery from the practitioner.[71] Logically, an analogous duty to inform must exist to the child who bears the condition. The duty can be extended to the child under two different constructions. First, the health care provider could be considered to owe a separate but similar duty to both the parent and the child. Second, the duty to the child could be considered to arise because the child is a foreseeable victim of any breach of duty to the mother.

The first approach concludes that the doctor owes a duty directly to the child. Where either pre-conceptive genetic counseling or prenatal care is sought, the physician is treating both the parent and child (or prospective child), and thus owes a separate but similar duty to both.[72] The fact that the child is *in utero*, or possibly is not yet conceived, at the time of the negligent act presents no obstacle to determining that a duty to the child exists. *Bonbrest v. Kotz* established that a duty exists to a child *in utero*.[73] Precedent also exists for finding a duty to a child not yet conceived so long as that child is a "foreseeable plaintiff."[74]

---

68. Shaw, *Conditional Prospective Rights of the Fetus,* 5 J. LEG. MED. 63, 109-10 (1984).

> The nondisclosure of potential suffering of the child, not the right to abort, is the reason that parents with genetically defective children bring wrongful birth and wrongful life suits. The mother has the right to abort with no genetic counseling. But she has been denied the right to act on behalf of her fetus so that it will not be born with severe defects. Her desire to abort comes from her wish to act in the best interest of her potential child by preventing its existence. It is not her desire to have abortion, per se. When faced with a diagnosis of Tay-Sachs disease or infantile polycystic kidney disease, parents are willing to sacrifice their own strong desires to have a child in order to prevent that future child from suffering. *Id.*

69. *See, e.g.,* Harbeson v. Parke-Davis, 98 Wash. 2d 460, 656 P.2d 483 (1983); Gildner v. Thomas Jefferson Univ. Hosp., 451 F. Supp. 692 (E.D. Pa. 1978); Berman v. Allen, 80 N.J. 421, 404 A.2d 8 (1979); Jacobs v. Theimer, 519 S.W.2d 846 (Tex. 1975).

70. *Harbeson*, 98 Wash. 2d at 492, 656 P.2d at 492.

71. *Id.*

72. *Curlender*, 106 Cal. App. 3d at 828, 165 Cal. Rptr. at 488-89. *See also* Note, *Wrongful Life: A Modern Claim Which Conforms To The Traditional Tort Framework*, 20 WM. & MARY L. REV. 125, 140 (1978) [hereinafter *Wrongful Life: A Modern Claim*].

73. 65 F. Supp. 138, 140 (D.D.C. 1946).

74. For example, in *Rennslowe v. Mennonite Hospital*, a thirteen year-old girl

The difficulty with concluding that the child is owed a "separate" duty is defining the nature of the duty. Arguably, the duty to inform owed to a parent should not exist independently to a fetus who is incapable of acting upon the information. Although this contention is logical, it is too narrow. The child must have the opportunity, vicariously through the parent, to determine whether a life with his associated condition is in his best interest.[75] Simply because the child must rely on a third party to act does not absolve the doctor of his duty to protect the fetus by making the necessary disclosure to the parents.[76] Consequently, the health care provider can be considered to owe a duty to inform to the parents as well as a separate, but similar duty to inform to the child.

Under the second theory, the duty owed to the parents to provide complete and correct information inures directly to the child. A health care provider treating a prospective mother owes a duty to communicate to her any possible risks associated with bearing a child. The patient will rely on the information supplied by the health care provider. It is foreseeable that the patient's reliance on incorrect information may lead to the birth of an impaired child. The Restatement (Second) of Torts section 311 provides that "one who negligently gives false information to another is subject to liability for physical harm caused by action taken by the other in reasonable reliance upon such information, where such harm results . . . to such persons as the actor should expect to be put in peril by the action taken."[77] In wrongful life cases, the child is

---

received a transfusion of RH negative blood. The transfusion created the risk that any RH positive children she might carry could have a serious, or fatal, reaction to her RH negative blood. Subsequently, she had a child who, as a result of the transfusion, was born premature, jaundiced and suffering permanent damage to various organs, her brain and nervous system. The court allowed recovery saying that at the time of the negligent transfusion future children were foreseeable. 67 Ill. 2d 348, 367 N.E.2d 1250 (1977), *aff'd,* 40 Ill. App. 3d 234, 351 N.E.2d 870 (1976). *See also* Jorgensen v. Meade-Johnson Laboratories, Inc., 483 F.2d 237 (10th Cir. 1973) (Mongoloid children have claim against manufacturer of their mother's birth control pills for their mongoloid condition).

75. *See Wrongful Life: A Modern Claim, supra* note 72, at 140. *But see* Note, *Torts—Wrongful Life—No Cause of Action for Failure to Inform of Possible Birth Defects,* 13 WAYNE L. REV. 750 (1967) (author argues against recognition of a duty to the child).

76. *See* Note, *A Cause of Action for "Wrongful Life": A Suggested Analysis,* 55 MINN. L. REV. 58, 70 (1970).

77. *See* RESTATEMENT (SECOND) OF TORTS § 311 (1965). Section 311 provides that:

> (1) One who negligently gives false information to another is subject to liability for physical harm caused by action taken by the other in reasonable reliance upon such information, where such harm results
>
> (a) to the other, or
>
> (b) to such third persons as the actor should expect to be put in peril by the action taken.

the foreseeable victim of the negligent failure to communicate proper or complete information to the parents. Thus, the child has an action based on the injury that he received through the doctor's breach of duty to the parent. Under either theory, the health care provider's duty to disclose any information that he knows, or should know, regarding possible defects can be extended directly to the child.

When considering a wrongful life claim involving a plaintiff with a currently latent disorder, the duty analysis is exactly the same as any other wrongful life case. It matters little to the child whether the act of negligence occurred prior to conception or during the gestation period. Similarly, the child's concern is not so much when the injury manifests itself, but the fact that it does so at all.

The issues in *Cowe* are complicated by the fact that Jacob's birth mother, Melanie, functions at the mental level of an infant and was incapable of making any decisions for Jacob; however, this does not absolve Forum of its obligation to act in Jacob's best interests. Forum could be held to the standard wrongful life duty to disclose information of the child's possible condition. While Melanie herself could not have been informed of or acted upon the information, Forum should have communicated the information to Melanie's legal guardian. The guardian could then determine the necessary response considering the condition both of the child and of Melanie.

However, the court in *Cowe* adopted a broader definition. The holding creates a duty on the part of the health care provider to prevent conception to patients in their custody who are incapable of affirmatively deciding to have, or care for, a child. If read narrowly, the duty proscribed by the *Cowe* court exists only under the specific fact pattern of the case. However, the decision is subject to a wider and more encompassing interpretation.

A duty to prevent conception is owed to the parent/patient in the factual circumstances of *Cowe*. However, a determination that the duty to prevent life can be owed to the child created by the conception implies that simply achieving life is an injury. The attainment of life alone is not the injury that wrongful life claims compensate.[78] The harm to be

---

(2) Such negligence may consist of failure to exercise reasonable care
(a) in ascertaining the accuracy of the information, or
(b) in the manner in which it is communicated.

The rule stated in this Section finds particular application where it is a part of the actor's business or profession to give information upon which the safety of the recipient or a third person depends. Thus it is as much a part of the professional duty of a physician to give correct information as to the character of the disease from which his patient is suffering, where such knowledge is necessary to the safety of the patient or others, as it is to make a correct diagnosis or to prescribe the appropriate medicine. *Id.* comment b.

78. *See infra* notes 96-155 for discussion of damages.

avoided in wrongful life generally is life with a defect. To the extent the holding in *Cowe* finds that simply achieving life is a harm, it departs significantly from wrongful life precedent. Courts allow recovery for wrongful life in order to compensate for the undisclosed impairment accompanying the life.[79] Consequently, if *Cowe* is interpreted as consistent with existing precedent, Jacob would have to show that he suffered injuries other than simply his existence and that he would not have been born to endure those injuries had Forum fulfilled its duty.[80]

B. Breach

A health care provider is obligated to "exercise the same amount of care as a reasonable practitioner with the same skill and knowledge."[81] If, during the course of his association with a patient, he discovers, or should discover, the possibility of injury to the prospective or existing fetus, he must make that information available to the parents, thereby allowing them to make an informed decision regarding conceiving or carrying the child.[82] Failure to disclose this information is a breach of duty to both the parents and the child.[83] The breach becomes actionable if it leads to injury, regardless of whether that injury fails to manifest itself until sometime after the child's birth, so long as causation can be proven.

C. Causation

Breach of duty becomes actionable only if the defendant's actions or omissions are both the cause in fact and the proximate cause of the plaintiff's injury.[84] In a wrongful life action, the plaintiff does not claim that the negligence of the health care provider caused the defect from which the plaintiff suffers.[85] Instead, the claim is that by failing to provide the parents with pertinent information, the practitioner denied them the opportunity to make a knowledgeable decision regarding whether the child should or should not be born.[86] This denial leads to the birth

---

79. *Id.*

80. The dissenting opinion in *Cowe* suggests recovery may have been appropriate had Jacob presented any physical injury. "More important in both *Procanick* and *Harbeson*, the birth defects were known, specific, articulable defects which clearly resulted from the medical conditions of which the doctors negligently failed to apprise the parents." 541 N.E.2d 962, 973 (Ratcliff, J., dissenting).

81. PROSSER & KEETON, *supra* note 64, at 185.

82. *See supra* notes 65-80 for discussion of duty.

83. Harbeson v. Parke-Davis, 656 P.2d 483, 490-91 (Wash. 1983).

84. *See* PROSSER & KEETON, *supra* note 64, at 165.

85. *E.g.*, Gleitman v. Cosgrove, 49 N.J. 22, 28, 227 A.2d 689, 693 (1967).

86. *Id.*

of the child—the "maturing of the harm."[87] But for the physician's negligence, the child would not have been born to suffer.

Defendants often assert that the child's inherited genetic make-up or maternal illness is the proximate cause of his injury.[88] They conclude that an intervening harm broke the chain of causation.[89] This rationale fails on two counts.[90] First, by definition, an intervening cause is one which "comes into active operation in producing the result, *after* the negligence of the defendant."[91] Where the doctor's negligent failure to inform occurs after the condition came into existence, the condition itself cannot be considered an intervening cause. The negligent act occurred after the illness. Second, where the failure to warn preceded conception and the occurrence of the alleged intervening cause, many courts hold that the defendant is not absolved of his duty if the intervening cause was foreseeable.[92] Where the effect of a potential genetic malformation is a foreseeable consequence, and the health care provider failed to detect and/or inform of this defect, he should be held liable for the resulting injury.[93]

The most prevalent limiting doctrine in determining the legal cause of an injury is foreseeability.[94] It is not unreasonable to assume that when a pregnant woman seeks prenatal care or preconceptive counseling she will rely upon the diagnosis. Should the diagnosis be incorrect, it would affect both the woman being treated and her child. The child, thus, is a foreseeable plaintiff.

To prove causation, the child must show that in the face of full disclosure, his parents would have decided not to conceive or to abort

---

87. *See Wrongful Life: A Modern Tort*, *supra* note 72, at 144.

88. *See* Rogers, *Wrongful Life and Wrongful Birth: Medical Malpractice in Genetic Counseling and Prenatal Testing,* 55 S.C.L. REV. 713, 732-33 (1982).

89. *Id.*

90. *See Wrongful Life: A Modern Tort*, *supra* note 72, at 145.

91. PROSSER & KEETON, *supra* note 64, at 301 (emphasis in original).

92. *See* Park v. Chessin, 60 A.D.2d. 80, 400 N.Y.S.2d 110 (1977).

93. Two wrongful birth cases support this proposition. *See* Custodio v. Bauer, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967). In a wrongful birth action resulting from a negligently performed sterilization operation, the California Court of Appeals held that upon a showing that the defendants breached a duty, there need only be proof that the negligence was the *proximate*, not the *sole*, cause of the damages.

> The general test of whether an independent intervening act, which actively operates to produce an injury, breaks the chain of causation is the foreseeability of that act. . . . It is difficult to conceive how the very act the consequences of which the operation was designed to forestall, can be considered unforeseeable.

Id. at 316, 59 Cal. Rptr. at 472 (citations omitted). *See also* Troppi v. Scarf, 31 Mich. App. 240, 187 N.W. 551 (1971) (court could not say that pharmacist's failure to fill birth control prescription properly was not the proximate cause of the birth of the child).

94. Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928).

thereby preventing his birth and his accompanying injury.[95] The defendant's failure to disclose may be deemed the proximate cause of the child's suffering, and he can be held liable for damages resulting from the plaintiff's injury.

D. Damage

Courts refusing to recognize wrongful life claims generally base their decisions on two policy considerations.[96] First, many opinions reflect a fear that allowing a wrongful life claim demands a determination that an impaired life is inherently less valuable than a non-impaired life.[97] "[H]uman life, no matter how burdened, is, as a matter of law, always preferable to nonlife."[98] The decisions conclude that the plaintiff suffered no legally cognizable injury by being born with a congenital or genetic defect.[99]

Second, there exists a perceived inability to [fairly] assess damages.[100] Traditional valuation techniques are unavailable in a wrongful life claim. Because of the nature of the child's injury, the only choice was to be born with the condition or not to be born at all. Many courts believe this compels them to perform the impossible task of measuring the value of an impaired life against non-existence in order to determine a damage amount.[101] They reason that because the plaintiff cannot be made whole again, any award is bound to be too speculative.[102] The metaphysical

---

95. Of course, if in the face of a full and accurate disclosure, the parents continue the pregnancy, the physician must logically be relieved of liability. He fulfilled his duty. The difficulty of proving this last element of causation can act as a limiting factor on the number of successful wrongful life claims. If the plaintiff is required to show that a reasonable parent would have prevented the child's existence, only those cases in which the plaintiff's injuries are truly severe will succeed.

96. Siemieniec v. Lutheran Gen. Hosp., 512 N.E.2d 691, 697 (Ill. 1987).

97. *See, e.g., Siemieniec*, 512 N.E.2d at 697; *Azzolino*, 315 N.C. at 109, 337 S.E.2d at 533 (1985); Blake v. Cruz, 108 Idaho 253, 260, 698 P.2d 315, 322 (1984).

98. *Siemieniec*, 512 N.E.2d at 697.

99. *See id.*

100. *Id.*

101. Speck v. Finegold, 268 Pa. Super. 342, 408 A.2d 496 ("[This] cause of action . . . demands a calculation of damages dependant on a comparison between Hobson's choice of life in an impaired state and nonexistence. This the law is incapable of doing." (fn. omitted). *Id.* at 365, 408 A.2d at 508.

102. Interestingly, this rationale is adopted by several courts which allowed the wrongful life action but denied general damage awards. Turpin v. Sortini, 31 Cal. 3d 220, 235, 643 P.2d 954, 963, 182 Cal. Rptr. 337, 346 (1982); Harbeson v. Parke-Davis Inc., 98 Wash. 2d 460, 482, 656 P.2d 483, 496-97 (1983); Procanik by Procanik v. Cillo, 97 N.J. 339, 353-54, 478 A.2d 755, 763 (1984).

task of determining the value of life, many jurists believe, is best left to philosophers and theologians, and not juries.[103]

Courts allowing awards to wrongful life claimants strike a balance between the apparent philosophical difficulties associated with making an award and the economic realities faced by an impaired child. The resolution hinges on the clarification of what the child's injury is and for what he is being compensated.

Curlender v. Bio-Science Laboratories first enunciated this compromise.[104] The court reasoned that the child was not damaged merely because he existed; rather, the injury was that he "existed and suffered."[105] Philosopher Joel Feinburg stated the theory more eloquently.[106] He proposed a "plausible moral requirement that no child be brought into the world unless certain very minimal conditions of well-being are assured."[107] If this basic minimum cannot be met, the child has been wronged by being born.[108] Feinburg argues that even though the child has not been "harmed" (since the child's initial condition was harmed, and the physician did not make it worse), the child can be wronged by being brought into existence in a condition to which any rational being would prefer non-existence.[109]

The failure of the health care provider to make full disclosure deprives the child of the opportunity to determine, vicariously through his parents, whether life in his condition is preferable to non-life. The deprivation of choice is the legal harm inflicted by the health care provider. As discussed earlier, it is a breach of the health care provider's duty. Where that breach leads to the birth of an impaired child, it becomes actionable in the form of wrongful life. The child's life with impairment is a consequence of the harm; it is the wrong suffered by the child. Thus, the child can recover the costs associated with those consequences.

Echoing *Curlender's* rationale, the majority in *Procanick by Procanick v. Cillo* stated:

> We need not become preoccupied, however, with these metaphysical considerations. Our decision to allow the recovery of extraordinary medical expenses is not premised on the concept that non-life is preferable to an impaired life, but is predicated on the needs of the living. We seek only to respond to the call

---

103. Becker v. Schwartz, 46 N.Y.2d 401, 411-12, 386 N.E.2d 807, 812, 413 N.Y.S.2d 895, 900-01 (1982).

104. 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (1980).

105. *Id.* at 828, 165 Cal. Rptr. at 488.

106. J. Feinburg, Harm To Others 97-104 (1984).

107. *Id.*

108. *Id.*

109. *See also* Elias & Annas, *supra* note 24, at 118-20.

of the living for help in bearing the burden of their affliction.[110]

Plaintiffs bringing wrongful life claims generally incur tremendous costs associated with their conditions, such as ongoing medical care, pharmaceutical costs, and special education needs.[111] These costs can devastate a family financially as well as emotionally. Thus, the recovery allowed is accordingly aimed at alleviating these extraordinary expenses. General damages are still not available, however, because of the perceived impossibility in calculating the appropriate amount of damages.[112]

The court in *Cowe* found two possible areas of damage. First, the court recognized an injury based on Jacob's family situation. The majority decision expands the definition of wrongful life to "encompass Jacob's unusual situation."[113] The majority concludes that Forum had a duty to Jacob to prevent his conception. The court determined that Forum could be liable in the form of support from the time of Jacob's birth to his adoption.[114] Although merely dictum, the concurring opinion suggests that Jacob also should be allowed to recover "for his mental pain, suffering and anguish based on any diminished quality of life he may suffer from being the genetic off-spring of mentally deficient parents."[115] The second area of damages identified by the opinion is "compensation for physical injury." The court determined that because Jacob "has or had a chance of physical injury" due to Forum's administration of Dilantin to Melanie while Jacob was *in utero*, he could recover for any physical harms resulting from that exposure.[116]

1. The Family Status Injury.—Cowe's acceptance of Jacob's birth to incompetent parents as an injury compensable under wrongful life is a stark departure from precedent. Injuries based on family situation or

---

110. Procanik by Procanik v. Cillo, 97 N.J. 339, 353, 478 A.2d 755, 763 (1984).

111. Note, *Father and Mother Know Best: Defining the Liability of Physicians for Inadequate Genetic Counseling,* 87 YALE L. J. 1488, 1496 (1978). Genetic defects represent an increasingly large part of the overall national health care burden. A 1975 Congressional report estimated that at that time, cost of treatment for a hemophiliac ran $12,000 a year while it cost $20,000 to $40,000 a year to care for a Tay-Sachs infant until its death. The diet necessary during early childhood for a person with PKU to prevent severe mental retardation, a relatively minor intervention, costs from $8,000 to $10,000 a year. *Id.* at 1488 n.35 (quoting H.R. REP. No. 498, 94th Cong., 1st Sess. 18-19 (1975)), *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 709, 726-27.

112. *See* Turpin v. Sortini, 31 Cal. 3d at 220, 235, 643 P.2d 954, 963, 182 Cal. Rptr. at 346 ("it would be impossible to assess [general] damages in any fair, non-speculative manner").

113. *Cowe*, 541 N.E.2d at 968.

114. *Id.* at 967.

115. *Id.* at 968 (Conover, J., concurring).

116. *Id.*

legal status have been rejected as foundations for wrongful life claims.[117]

As discussed previously, the wrongful life claim was originally brought by illegitimate children against their fathers for lack of both the social and financial status associated with their illegitimacy.[118] The court in *Zepeda v. Zepeda* noted that "[a] legitimate child has a natural right to be loved and cared for but cannot maintain an action against his own parents for lack of affection."[119] Similarly, "[a]n illegitimate child cannot be given rights superior to those of a legitimate child" and, thus, the illegitimate child has no cause of action.[120]

Courts have previously heard, and rejected, wrongful life claims by children in circumstances factually similar to Jacob's. In *Williams v. State*, the court held that "[b]eing born under one set of circumstance rather than another is not a suable wrong that is cognizable in court."[121] The California Court of Appeals in *Foy v. Greenblot* determined that a child whose only claimed injury was being born to an adjudicated incompetent in a mental health facility failed to state a claim for wrongful life.[122] The court suggests the possibility of a different result had the plaintiff suffered any "legally cognizable injury as a consequence of respondent's conduct."[123]

On its face, the *Cowe* decision purports to limit itself to the unusual facts of the case. In consideration of these facts, the decision seems equitable. However, family status injuries are not the type of injury addressed in wrongful life claims.

Awards are made to wrongful life plaintiffs who suffer some impairment associated with their lives. To recognize birth to a particular set of parents in any circumstance, even those as sympathetic as Jacob's, would require the court to determine that birth into a less than desirable family situation alone is a legal injury.

After recognizing birth to incompetent parents as a legally compensable injury, it will become logically difficult to deny the pleas of infants born into equally difficult circumstances. The court doors would need to be opened to any person unhappy with their family situation or social status. The logic of precedent on this question is solid; dissatisfaction with one's family situation alone cannot be considered acceptable grounds for stating a wrongful life claim.

---

117. *See, e.g.,* Zepeda v. Zepeda, 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963); Williams v. State, 18 N.Y.2d 481, 223 N.E.2d 343, 276 N.Y.S.2d 885 (1966).

118. *See supra* notes 28-34 and accompanying text.

119. 41 Ill. App. 2d at 255, 190 N.E.2d at 856 (1963).

120. *Id.*

121. Williams v. State 18 N.Y.2d 481, 484, 223 N.E.2d 343, 344, 276 N.Y.S.2d 885, 881 (1966).

122. 141 Cal. App. 3d 1, 14, 190 Cal. Rptr. 84, 93 (1983).

123. *Id.*

2. The Prospective Injury.—The second area of damage recognized by the *Cowe* court is Jacob's claim for potential physical harms resulting from his *in utero* exposure to Dilantin. The court considered a medical inventory which predicted that Jacob sustained a ten percent risk of experiencing Fetal Hydantoin Syndrome. Because Jacob exhibited no symptoms of the syndrome at the time of the trial, any award made to him would be considered prospective. In contrast to the court's holding regarding family status injury, allowing recovery for future injury does not represent a significant change to the tort of wrongful life. The logic of allowing prospective damage claims in a wrongful life action is supported by analogy to other torts, such as toxic tort claims, in which prospective damages are regularly awarded. The need for such claims is created by the character of the disorders themselves.

The types of congenital defects which give rise to wrongful life claims present a number of special obstacles to the plaintiff and the court due to their often unpredictable nature. Genetic disorders in particular often possess characteristics which create tremendous difficulty in determining when a plaintiff should bring an action and what, if any, time limitations should be placed on the right to institute a suit.

In a condition with delayed manifestations, the existence of the injury may not become known until long after the statute of limitations has run.[124] In a jurisdiction using a discovery rule, the plaintiff may not lose his right to bring suit; however, the damage may not become apparent until years, or even decades, later. Bringing a defendant to court as much as fifty years after the alleged negligence works the very type of inequity statutes of limitations are designed to prevent.[125]

Other genetic diseases exhibit traits known as decreased penetrance or multiple expressivity. In disorders with decreased penetrance, even though the altered genetic structure exists, the illness may never occur.[126] Multiple expressivity describes conditions, such as neurofibromatosis, which may cause the plaintiff to experience a variety of symptoms. These disorders can be unpredictable as to course and severity.

A plaintiff suffering from a defect with multiple expressivity may bring suit upon first becoming aware of her condition. Because of the difficulty in predicting the future course of the disorder, and consequently

---

124. For example, the Indiana statute of limitations requires actions be brought within two years of the alleged negligent act. Minors under the age of six have until their eighth birthday to bring an action. IND. CODE § 16-9.5-3-1 (1988).

125. *See generally* PROSSER & KEETON, *supra* note 64, at 166.

126. For example, Martin-Bell Syndrome (also called x-linked mental retardation), characterized by large protruding ears and protruding chin and mild to moderate mental retardation, appears in only 80% of those males who carry the gene. M. THOMPSON, GENETICS AND MCCEDICINED 63-64 (4th Ed. 1986).

the proper damage amount, a court may choose to compensate for only those manifest symptoms. However, if the plaintiff later develops different, and much more severe symptoms, a second suit is barred by res judicata.

Toxic exposure cases, such as those resulting from asbestos[127] or DES[128] exposure, frequently present the same type of variable, slow manifesting injury. Toxic exposure claimants often seek not only compensation for any existing injury but also awards for "enhanced risk" of suffering other maladies associated with the particular variety of toxic exposure.[129] Courts hearing enhanced risk cases wrestle with both the qualitative and quantitative possibility that the plaintiff will indeed experience any future harm.[130] They must assess the reliability of scientific evidence and attempt to predict the course and severity of the injury.

Initially, the court must determine whether a plaintiff exposed to a toxic substance has one injury or multiple separate injuries. When the disease for which the plaintiff alleges increased risk is considered both a separate and distinct injury from that which he currently suffers, questions arise as to when the plaintiff should be allowed to recover. Should the plaintiff be able to seek an award at this time for both current and future harm or should the statute of limitations and the rule against claim splitting be waived in order for him to pursue a later claim if it becomes necessary?[131] Courts have devised a myriad of solutions to these questions. Decisions in the toxic exposure area provide a wealth of precedent for examining prospective damage claims and, by analogy, suggest possible adaptations which would allow a wrongful life claimant with prospective injuries to seek relief in court.

a. The threshold question: existence of present injury.

When seeking relief for enhanced risk, the plaintiff's threshold question is the existence of a current physical injury causally related to the

---

127. Exposure to asbestos can lead to a form of lung disease (pneumoconiosis), marked by interstitial fibrosis of the lung ranging in extent from minor involvement of the basal area to extensive scarring associated with increased incidence of mesothelioma and bronchogenic carcinoma. "There is no correlation between the severity of asbestosis and the development of malignancy. Indeed, lung cancers have developed in the absence of interstitial pulmonary fibrosis and significantly there is a poor correlation between the intensity of the exposure and the predisposition to cancer." ROBBINS, *supra* note 27, at 479-82.

128. Women exposed to DES (diethylstilbestrol) while *in utero* show characteristic changes in the cervix and vagina and are subject to increased risk of vaginal or cervical carcinoma. Less than 14% of such DES exposed women develop adenocarcinoma tumors. ROBBINS, *supra* note 27, at 1138.

129. *See generally* Birnbaum and Wrubel, *Emerging Damage Issues in Toxic Tort Litigation*, in PREPARATION AND TRIAL OF A TOXIC TORT CASE 311 (1988).

130. *Id.* at 323.

131. *Id.*

enhanced risk injury.[132] Enhanced risk claimants lacking an existing physical injury are barred from recovery.[133] For example, although a plaintiff may have been "wronged" by exposure to a toxic substance, most courts would not consider the exposure without a demonstration of resulting physical harm a sufficient ground for a negligence claim.

For the wrongful life plaintiff whose condition is such that some physical symptoms of his disorder are currently displayed, this requirement is no obstacle. Where, however, there are no current demonstrable symptoms, the plaintiff fails to meet the threshold test unless the court accepts a liberal interpretation of injury or damage.[134]

For example, although a latent genetic condition may not be demonstrable through the introduction of existing symptoms, the plaintiff could still prove that he possesses the necessary genetic makeup.[135] From that point, he could make a case for damages based on his probability of suffering the symptoms associated with his condition.

Bradfford v. Susquehanna Corporation[136] demonstrates this theory. Defendants filed for summary judgment alleging heightened risk of cancer stemming from exposure to high levels of radiation. The court recited the general proposition that there can be no recovery in the absence of present physical injury, but did not dismiss the claim.[137] The plaintiffs, the court found, raised a question of fact with respect to the present physical injury requirement by alleging that "chromosomal damage is itself a present injury that can give rise to a claim for future risk of cancer."[138] The court went on to caution that its holding be narrowly

---

132. Whitehead & Espel, *Damages for Speculative Toxic Tort Consequences?: Wait and See*, in PREPARATION AND TRIAL OF A TOXIC TORT CASE 446 (1988).

133. *See* Mink v. University of Chicago, 406 F. Supp. 713, 719 (N.D. Ill. 1978) (In a lawsuit brought by women who had ingested DES, plaintiffs sought damages for enhanced risk of cancer. The court held that the "mere fact of risk without accompanying physical injury is insufficient to state a claim for strict products liability.").

See also Morrissy v. Eli Lilly & Co., 76 Ill. App. 3d 735, 394 N.E.2d 1369 (1979) (DES exposure; heightened risk of contracting cancer insufficient to state claim); Ayers v. Township of Jackson, 189 N.J. Super. 561, 461 A.2d 184 (Super. Ct. Law Div. 1983), *aff'd in part, rev'd in part*, 202 N.J. Super. 106, 493 A.2d 1314 (N.J. Super. Ct. App. Div. 1985), *aff'd in part, rev'd in part*, 106 N.J. 557, 525 A.2d 287 (1987).

134. As discussed earlier, the legal injury to the plaintiff is the deprivation of choice resulting from the health care provider's negligent failure to make full disclosure of information regarding the child's possible condition. Thus, in cases of future harm in a wrongful life action, the plaintiff must prove not only the injury, the failure to disclose, but also its consequence: the condition from which he suffers. It is the cost associated with this condition that forms the basis of the damage award. *See supra* notes 96-116 and accompanying text for discussion of damage.

135. *See generally* ELIAS & ANNAS, *supra* note 24.

136. 586 F. Supp. 14 (D. Colo. 1984).

137. *Id.* at 17.

138. *Id.*

construed in light of the strength of expert testimony on the existence of present chromosomal damage resulting from the levels of radiation to which the plaintiffs were exposed.[139] Fear that the plaintiffs would not "get a second bite of the apple" also influenced the court's decision.[140] By allowing proof of genetic malformation as sufficient to constitute present injury, a wrongful life plaintiff could proceed to establish the likelihood of the alleged future damage by showing that the probability of the future injury occurring meets an accepted degree of certainty.

b. The standard of proof.

The possibility of prospective injury in an enhanced risk claim must be proven by a statistical analysis of the risk which shows a reasonable medical probability that the disease will, in fact, develop. Merely showing a possibility of the occurrence of injury is insufficient.[141] "A jury may not award damages on the basis of speculation or conjecture. Instead, the plaintiff must present competent evidence from which the jury can reasonably determine the probability of the future injury occurring and, accordingly, the amount of damages to be awarded."[142] The standard typically accepted by courts is proof of the risk as being more probable than not.[143]

Application of this standard to wrongful life cases would allow a plaintiff suffering from a disorder with a predictable result to bring suit immediately. The plaintiff would only need to demonstrate that he possesses the requisite genetic makeup and then present evidence addressing the condition's anticipated course and severity.

Where the condition's manifestations are both numerous and/or inherently unpredictable as to scope and character, procedural adaptations will be necessary. Typically, a plaintiff with this type of condition cannot anticipate, with sufficient legal certainty, the severity of his disorder. A deserving plaintiff may be denied any recovery due to his inability to

---

139. *Id.* at 18.

140. *Id.*

141. Martin v. Johns-Manville Corp., 508 Pa. 154, 494 A.2d 1088 (1985) (asbestosis worker denied award for enhanced risk of cancer for failure to show increased risk to sufficient probability).

142. *Id.* at 1094 n.5 (citation omitted).

143. *See* Hagerty v. L & L Marine Servs., 788 F.2d 315, 319 (5th Cir. 1986) ("a plaintiff can recover only where he can show that the toxic exposure more probably than not *will* lead to cancer") (emphasis in original). *See also* Lohrmann v. Pittsburgh Corning Corp., 782 F.2d 1156 (4th Cir. 1986) (failure to show injuries more probable than not); Herber v. Johnson-Manville Corp., 785 F.2d 79, 82 (3rd Cir. 1986) (plaintiff could not recover where medical witness not prepared to testify that plaintiff would, more likely than not, develop cancer).

bring his case within the proper statute of limitations period. The converse inequitable result is also possible: a plaintiff could make the necessary showing of probability to collect for the risk of developing the disorder, but may never suffer the disease and thereby collect a windfall.

Courts hearing toxic tort cases have attempted to devise procedural strategies to prevent either inequity. One frequently used method recognizes the enhanced risk injury as a separate and distinct injury from that which already exists.[144] A plaintiff may then await development of the effects of his disorder without losing his right to bring suit.[145] Allowing a later suit for the late developing injury circumvents the rule against claim splitting.[146] The rule requiring a plaintiff to bring one action to recover for all damages resulting from a single incident is designed to prevent vexatious litigation and a multiplicity of lawsuits.[147] Often, however, the greater injustice created by allowing only one suit outweighs the benefit gained in promoting the goals of judicial economy and finality.

In a toxic exposure case, a plaintiff's ability to split his claim depends upon the court's determination that the plaintiff may have multiple claims stemming from a single exposure.[148] In *Jackson v. Johns-Manville*

---

144. *See supra* note 129, at 311.

145. *See, e.g.*, Hagerty v. L & L Marine Servs., 788 F.2d 315, 320 (5th Cir. 1986) ("A prior but distinct disease, though the tortfeasor may have paid reparations, should not affect the cause of action and damage for the subsequent disease."); Devlin v. Johns-Manville Corp., 202 N.J. Super. 556, 495 A.2d 495 (1985) (same rule); Adams v. Johns-Manville Sales Corp., 727 F.2d 533 (5th Cir. 1984) (same rule under Louisiana law); Wilson v. Johns-Manville Sales Corp, 684 F.2d 111 (D.C. Cir. 1982) (same rule under D.C. law).

146. *See* RESTATEMENT OF JUDGMENTS § 24-26 (1982).

147. *Id.*

148. *See, e.g.*, Anderson v. W.R. Grace & Co., 628 F. Supp. 1219, 1231 (D. Mass. 1986) (Plaintiffs, who had ingested contaminated drinking water, brought suit seeking damages for increased risk of serious illnesses, including leukemia and other cancers. The court held the they could recover "their probable future costs and suffering due to ailments of the types they already suffered.").

> These diseases seem at least qualitatively different from the illnesses the plaintiffs have actually suffered. . . . If they are part of the same disease process, then plaintiffs may seek recovery for the future illness in this action by showing a reasonable probability they will occur. If, however, they are distinct diseases, then plaintiffs must wait until the disease has manifested itself to sue.

Id. (citation omitted). *See also* Devlin v. Johns-Manville Corp., 202 N.J. Super. 556, 495 A.2d 495, 502 (N.J. Super Ct. Law Div. 1985) ("Asbestosis and asbestos related cancer are separate and distinct disease processes. Each may exist apart from the other and may stem from the same exposure to asbestos. The cause of action for each disease may accrue on widely divergent dates since each disease has its own latency period between exposure and manifestation of disease."). Plaintiffs had no present right to sue, but could sue if they should develop cancer at later date. *Id.*

But see Joyce v. A.C. & S., Inc., 591 F. Supp. 449 (W.D. Va. 1984) (applying

Sales Corporation, an asbestos worker suffering from asbestosis brought suit for enhanced risk of cancer.[149] The Fifth Circuit determined that asbestosis and cancer are separate and distinct injuries, and that the plaintiff could not create a claim for the injury of cancer simply by showing that the exposure to asbestos fibers which led to asbestosis may also lead to cancer. "Logic and justice require that presently latent injuries must await their separate maturity."[150] The panel noted that there would be no harm to the plaintiff in requiring him to wait until the cancer manifested itself before bringing suit. Where a claim is split, the statute of limitations does not begin to run until such time as the second disease is or should reasonably be known to the plaintiff.[151]

Circumvention of the rule against claim splitting would allow a wrongful life plaintiff to bring suit immediately for his current symptoms and then, if necessary, bring a second suit for later manifestations stemming from the same condition. By allowing a plaintiff to await the development of his disorder before bringing suit, it is more likely that the award amount would be commensurate with the severity of the affliction.

In theory, use of these techniques in wrongful life cases is appealing. Their application to the situation in *Cowe*, however, demonstrates that the adaptations will not provide relief in every situation. As discussed earlier, Forum's negligence toward Jacob led to one legally compensable harm—the possibility of suffering Fetal Hydantoin Syndrome. If the court considers the effects of this illness to constitute one disease process, Jacob would be required to bring one claim for any effects of the Syndrome which he may suffer at the time of the suit, as well as the enhanced risk of suffering other complications in the future. Because the probability of Jacob's experiencing any consequences of the Syndrome is only ten percent, Jacob could not recover prospective damages.

However, suppose that the court considers exposure to Dilantin led to two separate injuries or disease processes: mental effects and physical

---

Virginia law), *aff'd*, 785 F.2d 1200 (4th Cir. 1986) (court reasoned that once a cause of action accrues, the statute of limitations begins to run against all damages resulting from the wrongful act, even damages which may not arise until a future date. The court realized that while this may produce a harsh result, the court did not feel that it was at liberty to modify the Virginia rule).

149. 727 F.2d 506 (5th Cir. 1984) (applying Mississippi law), 750 F.2d 1314 (5th Cir. 1985) (en banc) (vacating panel opinion), 757 F.2d 614 (5th Cir. 1985) (certifying questions to Mississippi Supreme Court), 469 So. 2d 99 (Miss. 1985) (en banc) (declining certification), 781 F.2d 394 (5th Cir.) (applying Mississippi Law), *cert denied,* 106 S. Ct. 339 (1986) (asbestos worker who suffered from a mild case of asbestosis barred from recovery for future risk of contracting cancer where he failed to prove probability of contracting cancer).

150. 727 F.2d at 520.

151. *Id.*

effects. The physical effects are noticeable soon after the child's birth although the mental effects do not become apparent until the child's school years. Utilizing the practice of allowing separate claims would allow Jacob, who lacks any of the structural deformities associated with the syndrome, to bring a later suit if he were to develop any of the mental deficiencies associated with the exposure. The statute of limitations against Jacob's second cause of action would not begin to run until he reasonably should know of these mental deficiencies.

The tolling of the statute of limitations on subsequent suits presents one of the difficulties inherent in genetic injury suits. Although in Jacob's case all the effects of the disease should be discoverable by the time he is five, the situation would be different if he suffered instead from myotonic dystrophy.[152] This disorder possesses a characteristic known as decreased penetrance, meaning that even in someone with the requisite genetic structure, occurrence of associated symptoms is highly unpredictable.[153] The severity of the disorder is variable and the age of onset ranges from infancy to middle age.[154] A patient showing only that he has the necessary genetic structure could not succeed on a claim for prospective damage because he would most likely fail to prove the course of his disorder to an acceptable degree of certainty. Allowing him to wait and bring suit once some symptoms occur would provide more certainty in determining an award. However, this places a tremendous burden on the health care provider named in the suit. Unlike a corporation, it is not reasonable to subject a single practitioner to liability for an act which may have occurred a quarter to a half a century earlier.[155]

As with toxic exposure cases, determining the most equitable method to provide the necessary compensation to plaintiffs in wrongful life cases without imposing undue burdens upon the health care provider/defendant will require experimentation and tailoring. A solution is necessary, however, to further the objectives of encouraging utilization of technology to detect genetic impairments.

III. Conclusion

Reticence to accept the claim of wrongful life reflects deep personal beliefs about the value of human life. Seemingly inherent in any judgment

---

152. *See supra* note 27 for definition of myotonic dystrophy.

153. *Id.*

154. *Id.*

155. A possible solution to this difficulty is the legislation of statutes of repose—ultimate limitations on a cause of action. *See generally* Prosser & Keeton, *supra* note 64, at 167.

allowing a child to state a claim based on the difficulties associated with his life is a need to place a value on that life. This flies in the face of the belief that life, even a less than perfect life, is always precious.

The impression that many have of an impaired child—the Tiny Tim character patiently smiling through his infirmity—is far from reality. "Impaired" frequently means more than handicapped or sickly. A genetically impaired child often endures a crippled, tortuous existence, wreaking a tremendous emotional and financial toll on the family as well as society. As medical technology advances, more and more plaintiffs will seek recovery based on injuries that they are fated to endure by their own genetic coding and on suffering which would not have been endured had the prospective parents been informed of its possibility.

We expect scientific advancements to lessen human suffering. Techniques to detect and treat genetic disorders are making dramatic strides toward meeting that goal. Simultaneously, however, we shudder at imposing standard liability on these types of diagnostic and treatment procedures. To do so requires the examination of questions of our own value and existence. Rather than addressing the difficult issues of our own mortality, we are often led astray by appeals to emotion such as arguments promoting the value of life. Although these arguments are of paramount importance, they often preclude consideration of the legal issue—the attachment of liability.

Yet, technology marches ahead with or without judicial recognition. Where this technology will affect human life, it becomes imperative that law and philosophy advance with it to determine its proper and improper uses, to impose limitations and, where necessary, grounds upon which relief can be sought when this technology goes astray. One step toward this objective is to recognize a limited claim for wrongful life.

Allowing recovery for wrongful life in any case, and particularly in cases where the injuries are prospective, demands careful examination and limitation. The alternative produces a Hobson's choice of denying recovery to deserving plaintiffs or opening the courts to every person dissatisfied with his life.

The fear of opening the floodgates of litigation is a viable concern. Consequently, the tort must remain limited to only those suffering serious injuries. As medical technology expands, what is serious today may not be serious tomorrow. As the ability to cure genetic illnesses develops, it is possible that claims will eventually be brought by plaintiffs for "dissatisfied life" rather than "wrongful life." However, the possibility of what we would currently consider a frivolous result provides no reason to deny the claim in truly deserving cases.

Recognizing the claim of wrongful life affirms the expansion of the health care provider's duty to utilize genetic technology conscientiously.

Encouraging the development and use of technology is a method of sparing physical, emotional, and economic costs associated with serious genetic injury. The necessity of imposing a duty upon those who provide such care or counseling is obvious. Like the duty governing all similar health care services, it is essential to ensuring accountability and a thorough, careful provision of services.

SUZANN M. WEBER*

---

* B.S. DePauw University, 1984; J.D. candidate Indiana University School of Law-Indianapolis, 1991.